IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

MEYER FELDMAN,

Appellant,

vs.

WILSON B. WOOD,
District Director of Internal
Revenue for Arizona,

Appellee.

No. 18,908

On Appeal From the Judgment of the United States District Court for the District of Arizona

## REPLY BRIEF FOR THE APPELLANT



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## I. THE SECTION 165 LOSS ISSUE.

The Government bases its argument that taxpayer did not suffer a deductible loss on the contention that he suffered no "economic loss" since, it is claimed, his "economic position" did not change (B.8). The Internal Revenue Code does not define the term "loss". The Regulations do. The Government's position assumes that it is necessary to have an economic loss in order to have a deductible loss. There are a number of situations under the Internal Revenue Code as interpreted by the Regulations where the loss allowed does not conform to the common and usual understanding of the term "loss".

For example, in the area of business casualty losses, under this very Code section, Treasury Regulations 1.165-7(b) provide that if property used in a trade or business is totally destroyed by casualty, and if the fair market value of such property immediately before the casualty is less than the adjusted basis of such property, the adjusted basis shall be treated as the amount of the loss for purposes of Section 165. Other examples occur in the area of exchanges where a taxpayer may have an "economic loss" from the exchange of a piece of property, but not be able to take such loss for tax purposes until the property received in exchange is sold in a later year. (Internal Revenue Code 1954, Section 1031 et. seq.)

Thus, the Regulations evidence a quite clear plan and intent that business losses shall be treated in a fashion different from non-business losses. Whether due to abnormal retirement, to a casualty (such as fire), to demolition, or to any other cause (such as theft), the Regulations provide that the amount of the deduction shall be the tax basis of the property, even if the tax basis exceeds the fair market value thereof; (see, for instance. Reg. 1.165-8(c)), which relates to theft losses and provides: "The amount deductible under this section in respect of a theft loss shall be determined consistently with the manner prescribed in Reg. 1.165-7 for determining the amount of casualty loss allowable as a deduction under Section 165(a)." As previously cited, Reg. 1.165-7(b) proceeds to set up as a general rule that the amount of the loss shall be no greater than the difference between the fair market value of the property immediately prior to the event and its fair market value immediately thereafter. If this were all that the Regulation provided, the Government's argument would be supported thereby. However, the

Regulation then goes on to state an exception to this general rule of economic loss, in these words: "However, if property used in a trade or business or held for the production of income is totally dstroyed by casualty, and if the fair market value of such property immediately before the casualty is less than the adjusted basis of such property, the amount of the adjusted basis of such property shall be treated as the amount of the loss for purposes of Section 165(a)." It should seem obvious from this that the plan of tax law is not, as the Government contends, to allow only an economic loss sustained in the specific tax year in which the event takes place, but is rather tied to the basic philosophy of allowing the taxpayer to recover his tax basis in business property.

Thus, the rule of Treasury Regulation 1.165-3(b), (Appendix, Opening Brief) is part of a consistent pattern, which allowed to this taxpayer, depreciation on the buildings while they stood, and allows him to deduct their unrecovered cost when they are demolished. The cited Regulation provides: "The amount of the loss shall be the adjusted basis of the buildings demolished, increased by the net cost of demolition or decreased by the net proceeds from demolition." This rule applies, under the clear plan and wording of the Regulation, to all situations where "Intent to demolish [was] formed subsequent to time of acquisition," with the one exception of the situation where the demolition takes place as a quid-pro-quo for obtaining a lease.

An entirely different rule applies to property that is neither used in a trade or business, nor held for the production of income. Since no depreciation is allowable on such property, the maximum loss deductible for any purpose on such property is the decline in fair market value. As to such property, the Government's argument of economic loss would be valid. It is simply

inappropriate here, since we are dealing with business property, rather than non-business property.

Assuming, however, for purposes of argument, that the Government is correct in stating that there must be some sort of "economic loss", they are not correct in concluding that there was no economic loss to this taxpayer by reason of the lease and subsequent demolition. Its contention, (B.8), that the Mayer lease was more valuable, is without a factual basis for the following reasons:

(1) The Blakely lease (Ex.Q.) was for a five-year term, while the Mayer lease (Ex.C.) was for a 99-year term. Thus, the Blakely lease allows the lessor to realize appreciation in the value of the property, while in the Mayer lease the lessee would realize most of the benefit. The Mayer lease would permit the value of the lessor's interest to increase only by reason of re-evaluation of the rental at every ten-year period. The rental increase is 12½% each ten years, or 1¼% annually, which is far below predicted and actual appreciation. Thus, under the Blakely lease, which would have expired in 1956, or in 1961 if Blakely had exercised his renewal option, taxpayer would have received the benefit from appreciation of the property, while under the Mayer lease, the lessee receives the benefit of the appreciation. Contrary to the Government's contention that the demolition would make the lease more valuable, "since lessees were in the process of putting the leased premises to a greater economic use," (B.8), the Mayer lease provides (Par.15), that any readjustment of rent shall be on land value only, not improvements. From this we may conclude that the taxpayer will receive no compensation for any improvements made under the Mayer lease. If we then consider that this is a 99-year lease, and a lessee constructed build-

ing, having a real life of 40-50 years, and a useful life of 20-25 years, (R.II. 33), the taxpayer's interest in this building is zero. *Mary Young Moore* v. *Commissioner*, 207 F.2d 265 at 271 (C.A. 9th).

2. The Blakely lease provides that the lessee cannot sublet and that no assignment of the lease could be made by lessee without prior consent of lessor, (Ex. A., p.3). The Mayer lease provides for unrestricted assignability and subletting by the lessee, (Ex.C., p.14).

3. The Blakely lease provides that the lessee shall be personally liable to the lessor, and that this liability shall continue regardless of any assignment made by the lessee, (Ex.Q., p.3). The Mayer lease provides for unrestricted assignment, and further provides that after such assignment the lessee shall no longer be personally liable, providing only that improvements of $75,000.00 are made at some time during the 99-year term, (Ex.C., p.14).

4. The Blakely lease provides that the premises should be used for a service station, parking lot and automobile business, (Ex.Q., p.3). The Mayer lease contains no restrictions as to use. Under the Mayer lease, the lessee is free to use the property for any purpose whatsoever, and the lessor could not prevent an uneconomic use which might result in insolvency of his lessee and devaluation or loss of his property interest.

5. The Blakely lease contains no subordination provision. The Mayer lease provides that the lessee may place a mortgage on the leased premises for the purpose of raising funds with which to construct improvements, and provides further that lessor is obligated to join in the execution of the note and mortgage (without personal liability), and is obligated to subordinate the own-

ership of the land to the lien of the mortgage, (Ex.Q., p.9). The taxpayer thus stood in danger of losing his entire equity in the property.

6. The Blakely lease contains no eminent domain provision, while the Mayer lease provides for termination of the lease in the event more than 30% of the property is taken by eminent domain and for abatement of rentals in the event that any part of the property is taken by eminent domain, (Ex.Q., p.9).

The Government bases the major part of its argument on the assumption, wholly unsupported by the evidence, that the lease was a valuable replacement for the demolished buildings. The above provisions refute this assumption, and the subsequent conduct of lessee Mayer proves it completely erroneous. Mayer, after demolition, construction a $400,000.00 building on the premises, (R.I. 12). The building and lease were assigned by Mayer to his "dummy corporation," (R.I. 44), whatever that may be. Taxpayer's interest therein was subordinated to a $555,000.00 lien of a first mortgage, (Ex.K, L, M.). Mortgage funds were expended on an entirely different piece of property in which taxpayer had no interest, (R.II. 50,54). The "dummy corporation" had no assets, and was delinquent in rent, taxes and mortgage principal payments, (R.II 44,46,54). From shortly after the date of the assignment by Mayer to Title Building Construction, (Ex.K,L), in 1956, taxpayer had nothing except the agreement of this "dummy corporation," with no assets, to pay him rent on a piece of land and building which were mortgaged substantially in excess of cost basis.

The net result of the Mayer lease to taxpayer, either before or after demolition, was that he was in a much worse economic position. The Mayer lease, by its very

terms, had a built in potential economic loss, and when all the surrounding facts and circumstances are looked at (as we are cautioned to do in *Young* v. *Commissioner*, 59 F.2d 691 (C.A. 9th), and *Manning* v. *Commissioner*, 7 B.T.A. 286), the demolition and subsequent construction merely accrued that loss.

The Government, (B. 9), states that the act of demolition should be treated as part of the original lease transaction. We do not know why this follows. The uncontroverted evidence shows that no immediate demolition was contemplated. The Government, either through direct evidence or cross examination, did not tie the demolition in 1957 to the 1955 lease, or the earlier 1951 lease. The fact that provision for demolition and for erection of improvements appears in the lease is irrelevant, for the lease term extended greatly beyond the useful life of the buildings and it was apparent to both lessor and lessee that at some time in the future something would have to be done about razing the old improvements and erecting new. The lessee would have been naive if he had not requested such a provision, and the lessor unreasonable if he had withheld it. However, such a provision is far different from one where, as consideration for the lease, the buildings are immediately demolished. Apparently, the Government refuses to concede that there can ever be a lease in which there can be a loss by reason of demolition. In fact the Government so states on page 10 of its brief:

> "Thus it is clear under the statute and cases that a lessor does not incur a loss when lessee demolishes buildings on leased premises."

This cannot be the law. If this is the law, why was any Regulation as to losses on leased property ever promulgated by the Commissioner of Internal Revenue?

If a taxpayer demolishes a building as a condition to entering into a favorable lease, then it is well settled that the unrecovered cost of the building becomes part of the lease. The unrecovered cost of the building then is no different than any other consideration paid to induce a lessee to execute a lease, and the Government has cited many cases to this effect—all of which we do not dispute. However, what of the lease that merely permits demolition; the lease in which demolition occurs several years later; and the lease in which demolition is not negotiated as a part of the rental consideration? Are not these the situations which the Regulation sought to clarify? If the Government believes, as it states, that there are no situations in which a lessor is entitled to a loss deduction for demolition by his lessee, then this Regulation should be repealed. It is not fair to the many accountants and tax advisors throughout the country to assume that this Regulation has some meaning and guidance, when the Government believes it does not. Mr. Justice Holmes said that men must turn square corners when they deal with the Government, and it is assumed that the same applies to the Government's relationship with taxpayers.

This "economic loss" argument becomes especially difficult to understand when we look at the long term economic effect of the Government's position. When this taxpayer dies, his heirs will take this property at its fair market value, but they will not be entitled to any part of the 99 years of amortization remaining at taxpayer's death, nor will they be allowed any depreciation deduction. *Rowan* v. *Commissioner*, 22 T.C. 865; *Mary Young Moore* v. *Commissioner*, 207 F.2d 265 (C.A. 9th). For these capital improvements, a deduction beyond taxpayer's life expectancy has been lost forever, to everyone.

While the Government would apparently like to

ignore this Regulation altogether, it does take the trouble to argue that demolition pursuant to the "requirements" of lease only must imply demolition, but if demolition is pursuant to the "terms" of a lease, it means that the demolition must be clearly expressed, (B.11). This reversal of the common meaning of these words then leads it to the conclusion that demolition pursuant to the "terms" of a lease is much narrower in meaning than demolition pursuant to the "requirements" of a lease. There is no justification for torturing the meaning of these words of common usage.

The general rule for the construction of language used in a statute, (or as here, a Regulation) apply, i.e., words do not acquire a different meaning when used in a statute; ordinarily they are to be given their usual, natural, plain, ordinary and commonly understood meaning. *Crane* v. *Commissioner*, 331 U.S. 1; *Helvering* v. *Hutchings*, 312 U.S. 393. The reason cited for changing the meaning of these commonly used words is that we must do so to make it consistent with relevant case law, (B.11,12). Assuming this is sufficient, and we do not believe it is, we entirely disagree with the Government's conclusion that our interpretation is inconsistent with relevant case law. It cites *Blumenfeld Enterprises, Inc.* v. *Commissioner*, 23 T.C. 665, aff'd per curiam 232 F.2d 396, and *Nickolls Estate* v. *Commissioner*, 282 F.2d 895. We discussed *Blumenfeld* in our opening brief, (B.16-18). The *Nickoll's Estate* case is not factually similar to the instant case. Counsel interprets *Nickoll* as merely authorizing demolition. The Tax Court opinion states: (32 T.C. 1346 at 1348):

> "Respondent [Government] contends that inasmuch as petitioners received a new lease covering a period of 30 years in which the lessee obligated itself to demolish the old building and to construct a new

building on the premises. . . ."

The Seventh Circuit Court opinion states, (282 F.2d 895 at 897):

> "The old building was substantially demolished as a *necessary* condition precedent to the execution of a remunerative lease under which taxpayers became the owner of a remodeled building. . . ." (underscoring supplied).

Under these circumstances, it appears there was no necessity for the Seventh Circuit Court to determine whether the term "requirement" should be construed as the Government now contends.

The Government has not cited one case involving a demolition which took place years after the property was acquired, and years after the lease was entered into, where the loss has been disallowed. In the cases it cites, the demolition was either required by the lease (or a modification thereof entered into prior to the effective date of the lease), or was performed prior to the tenant entering onto the premises. If the lease takes place at the time the property is turned over to the lessee, the act of demolition itself would determine the intent of the parties that the right to demolish was a quid-pro-quo for an advantageous lease. Further, the *obligation* (as in *Nickoll*) that a lessee demolish the old building, and construct a new building when a 30-year lease is involved, is factually far removed from granting *permission* to demolish buildings with estimated lives of under 25 years when a 99-year lease is being entered into.

## II. THE SECTION 167 DEPRECIATION QUESTION.

The Government fails to face up to and meet this issue. It states (B.14): "though the section [Section 1.167

(a)-8-(a), *Gains and Losses on Retirements*] provides that certain losses are recognized, it says nothing about whether a loss is allowed. We do not understand what the Government is trying to say. Is it saying that a recognized loss may not be allowed? The Regulations make no such distinction. We are aware of no cases that make such a distinction. A fair reading of the Regulation leads us to believe that a recognized loss means an allowable loss. This statement does serve to let the Government slip into the same argument, (and to cite the same cases), used in connection with its contention that the Section 165 business loss Regulations do not apply to this taxpayer, (B.14,15). It chooses to ignore that Section 167 is a depreciation section, and that the particular Regulation cited deals with the depreciation concept of an abnormal retirement. In our opening brief, (B.20,21), we discussed depreciation and retirement of cases. We do not think that the substance over form argument of the Government explains why this Regulation and these depreciation principles and cases are not applicable to this taxpayer.

The Government makes the following interesting statement, (B.15):

> "Were taxpayer to have merely demolished the buildings and not received a valuable lease by reason of such demolition, he would have been entitled to deduct his full unrecovered cost basis of the demolished buildings in the year of demolition."

Is this not a confession of the correctness of taxpayer's position here? The Government is saying that if there is demolition not in exchange for a lease, the deduction is allowable. The uncontroverted evidence, in the instant case, is that the demolition was not bargained for, and was not in exchange for the lease.

The cited Regulation deals squarely with taxpayer's situation. A taxpayer is entitled to recover his capital investment in building improvements. This benefit is not changed one bit by his leasing the property to someone. While the buildings stand, the depreciation is based upon their estimated life to the taxpayer. *The Hertz Corporation* v. *United States*, 364 U.S. 122. When they are demolished, the unrecovered cost is to be allowed as a deduction in the year of demolition. It is not necessary, and it would be impossible, except in rare instances, for a taxpayer to show an economic loss on the demolition itself, since demolition will only take place if the demolisher believes that the property is better off without the improvements than with them. The Government's argument implies the existence of a rule to the effect that upon entering into a lease for a term longer than the useful life of the buildings, the taxpayer's unrecovered cost of the buildings becomes part of the basis of the lease. By so doing, it has reached a result which is inconsistent with the basic framework of the tax law, is inequitable when applied to this taxpayer, and is contrary to existing case law. *Swoby Corporation* v. *Commissioner*, 9 T.C. 887; *Alaska Realty Co.* v. *Commissioner*, 141 F.2d 675 (C.A. 6th).

The basic framework in regard to depreciation is set forth in Mertens Law of Federal Income Taxation, Vol.4, Sec.23.04, pp.12-13, as follows:

> "In terms of purpose, the allowance under the code of a deduction for depreciation has been judicially stated to permit the taxpayer to recover his capital investment (cases cited) in wasting assets free of income tax. (Cases cited). That statutory method is satisfied by any method of accounting under which the taxpayer can arrive at 'a reasonable allowance' for depreciation."

The Government's refusal to recognize a change in

the law, and a change in its rulings, is no more evident than its statement, (B.16), that the instant case is analogous to the situation, where, under the terms of a long-term lease, the lessee undertakes to make good physical exhaustion as it takes place. It then states that in such a situation the lessor is not entitled to depreciation, *when the exact opposite is true,* and the Revenue Ruling it cites says so.

Revenue Ruling 62-8, 1962-1 Cum.Bull. 31 at 34 states:

> "In view of the foregoing, it is held that a lessor may, upon proper showing, be entitled to some allowance for depreciation (including any obsolescence) of leased depreciable property in a taxable year or years during the term of a lease for several years, even though the lessee has agreed to so preserve, replace, renew and maintain such property, and all additions, amendments, and improvements thereof, that, at the termination of the lease, the property shall be in at least as good condition as at its beginning."

The fact that the claimed depreciation by abnormal retirement, in the instant case, occurred in the space of one taxable year, does not affect the claimed deduction. This Court stated in *Keller Street Development Co.* v. *Commissioner,* with reference to a claimed depreciation deduction for obsolescence, 323 F.2d 166 at 172:

> "* * * It is conceivable that an external force may arise within a single taxable period which will cause the sudden uselessness of a business asset. There is no compelling logic persuading this court to formulate a rule which would permit the allowance of an obsolescence deduction when the process of growing useless occurs over a thirteen month period but which would require the disallowance of such a deduction if the process of growing useless occurs within a twenve-month period. The taxpayer should

be permitted to recoup the capital expended for the property out of its earnings during the period in which the property grows useless regardless of the length of that time period."

If we accept the Government's basic argument, as stated throughout its brief, (B. 8,11,16), that taxpayer was not economically affected by the demolition since he received a lease whose term exceeded the useful life of the buildings, is not the Government in a completely illogical position? The Government allowed a depreciation deduction for all years including 1957, (R.I. 9,17). If taxpayer ceased to have an economic interest in the building sufficient to justify a depreciation deduction, he ceased to have such an economic interest on June 1, 1955, when the lease for 99 years was executed. If he continued to have an economic interest in the building sufficient to justify depreciation for the last half of 1955, all of 1956 and the first seven months of 1957, he is entitled to recover his entire basis for depreciation in 1957 at the time the building was demolished, either as a demolition loss pursuant to the loss regulations, or as a depreciation deduction, which deduction is making good inadequate prior depreciation, the inadequacy of which was determined by the event of demolition.

## CONCLUSION

It is respectfully submitted that for the foregoing reasons, the trial court should be reversed.

*Respectfully submitted,*

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No. 18910

# In the United States Court of Appeals for the Ninth Circuit

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LAWRENCE Y. S. AU and WRONA K. H. AU,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

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**On Petition for Review of the Decision of the Tax Court of the United States**

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## BRIEF FOR THE RESPONDENT

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COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

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**On Petition for Review of the Decision of the Tax Court of the United States**

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# BRIEF FOR THE RESPONDENT

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## OPINION BELOW

The opinion of the Tax Court is reported at 40 T.C. 264.

## JURISDICTION

This petition for review (R. 52-53) involves federal income taxes for the taxable year 1957. On June 30, 1960, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency, asserting deficiencies in those taxes in the amount of $62.06. (R. 1, 5-6.) Within 90 days thereafter, on

August 29, 1960, the taxpayer filed a petition with the Tax Court for a redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (R. 1-3.) The decision of the Tax Court was entered on May 10, 1963. (R. 29.) The case is brought to this Court by a petition for review, postmarked August 8, 1963, and filed on August 12, 1963, a Monday. (R. 52-54.) The petition was timely filed under the provisions of Sections 7483, 7502 and 7503 of the Internal Revenue Code of 1954. Jurisdiction in this Court is invoked under Section 7482 of that Code.

## QUESTION PRESENTED

Whether the taxpayer's depreciation basis for an automobile acquired and used for six years for personal purposes and then converted to business use is the fair market value of the auto at the time of the conversion, as found by the Tax Court, or the taxpayer's original cost as urged by the taxpayer.

## STATUTES AND REGULATIONS INVOLVED

The pertinent parts of the statutes and Regulations involved are set out in the Appendix, *infra*.

## STATEMENT

The relevant facts as found by the Tax Court may be stated as follows (R. 18-23):

Taxpayers, husband and wife, are, and were during the year 1957, residents of Honolulu, Hawaii.

They filed a timely joint federal income tax return for the year 1957 with the District Director of Internal Revenue at Honolulu, Hawaii. Taxpayer Wrona had no separate income and is one of the taxpayers solely because a joint return was filed. Hereinafter Lawrence will be referred to as the taxpayer.

During 1957 taxpayer was a salaried employee of Leahi Hospital in Honolulu, where he was employed as its chief accountant. During that year he also worked as a public accountant.

Taxpayer's brother, Alfred Y. K. Au, hereinafter referred to as Alfred, was at all times material hereto a resident of Honolulu, Hawaii. During 1957 Alfred was employed by the City and County of Honolulu as a salaried auditor. He also rendered services to private clients as a certified public accountant.

On his 1957 income tax return, taxpayer reported salary from his employer and also profits from business. On Schedule C, taxpayer listed his principal business activity as a public accountant. He reported gross receipts of $1,756.80, business deductions of $904.20, and a net profit of $852.60. Business deductions claimed were as follows:

| | |
|---|---|
| Depreciation on 1950 automobile | $500.00 |
| Automobile repair | 71.04 |
| Automobile insurance | 33.00 |
| Automobile gas | 143.78 |
| Taxes on business and business property, and license | 31.38 |
| Public relations, dues, and subscriptions | 125.00 |
| | $904.20 |

Taxpayer reported no partnership income on his 1957 income tax return.

The automobile on which depreciation was claimed was a 1950 four-door Plymouth sedan which had been purchased by taxpayer in the early part of 1951 for $2,500. Prior to 1957 taxpayer made no business use of the automobile; in 1957 he converted it to business use. The original cost to him of $2,500 was used by the taxpayer as his basis for depreciation. A straightline method of depreciation and a life of five years were adopted.

In September, 1959, taxpayer was advised by the Commissioner's examining agents that his 1957 joint income tax return was being audited and that a question was being raised as to the proper basis for depreciation of the 1950 automobile.

On May 12, 1960, the taxpayer and Alfred filed a Form 1065, U.S. Partnership Return of Income, for 1957. The face of that return bore the note, "Income already reported on partners' returns for 1957." Under the depreciation schedule taxpayer's automobile was depreciated at $500, using the $2,500 cost as its basis. Taxpayer's partnership share of income was shown as $852.60, the same amount of profit which he reported on his 1957 individual income tax return theretofore filed as profit from his own business.

On June 8, 1960, taxpayer filed what was entitled "Corrected Return" for 1957 on Form 1040, which in all material respects conformed to the earlier return except that the amount of $852.60 was shown as income from partnership and no Schedule C was appended thereto.

During 1957 taxpayer and Alfred each held himself out as an individual accountant servicing clients in his own name. Each used a separate letterhead and rendered separate statements to clients. Each helped out with the other's work. Alfred had a number of clients. During 1957 taxpayer had only one account, Kaimuki Bakery, which paid $900 for the service.

Beginning on January 1, 1957, and continuing for about five months, taxpayer's car was utilized as a mobile office in which equipment was carried. Taxpayer and Alfred each operated from the car in working for private clients. About June, 1957, taxpayer and Alfred commenced sharing an office at Room 1, 1153 - 12th Avenue, Honolulu, Hawaii.

On June 1, 1957, a bank account was opened in the name of the taxpayer and Alfred. Payments made to each for accounting services were deposited in this joint account and expenses of maintaining the office were paid by checks drawn on this account.

There was no formal or written agreement between taxpayer and Alfred in regard to their arrangement and no prior binding agreement regarding distribution of income and expenses reflected in the joint bank account. Income and expenses were allocated at the end of the year, taking into account the assets of each party which had been utilized. Taxpayer received about 31 percent of the net proceeds in 1957. This percentage varied in subsequent years.

Aside from the Form 1065 filed in 1960 for calendar year 1957, as described above, taxpayer and Al-

fred did not file any partnership returns of income for any year subsequent to 1957, up to and including for the year 1961.

On the joint tax returns filed by taxpayer and his wife for the years 1958 to 1960, no partnership income was reported. In each of those returns a Schedule C was attached reflecting profit from the individual business of the taxpayer as a public accountant. Depreciation in the amount of $500 for the 1950 Plymouth automobile was claimed in addition to other business deductions.

During the years 1956 to 1960, inclusive, Alfred reported on his federal income tax return filed for each year as an individual the receipts from his business activities as a certified public accountant. No reference was made on any of these returns to the existence of any partnership, and no partnership income was designated thereon.

Taxpayer and Alfred each had his own separate accounting license to engage in business; each secured such license by virtue of a separate application submitted as an individual and not as a partner in a partnership.

Taxpayer and Alfred did not register as a partnership under Chapter 186, Revised Laws of Hawaii of 1955, which laws were in effect throughout the year 1957.

No partnership returns of income were filed by Alfred and taxpayer with the Department of Taxation of Hawaii. There is no record in the Department of Treasury and Regulation of a partnership doing business as Lawrence Au and Alfred Au.

In 1957, when taxpayer converted the automobile to business use, it had been operated for about 25,000 miles and was in good condition. In 1957, Plymouth automobiles of the model and type herein involved were being offered for sale in the Honolulu area, and could be purchased in good condition for lees than $650. The Official Guide used in the Hawaii area representing the average of used car prices reflected the average retail price of 1950 Plymouth automobiles at less than $650.

The fair market value of the 1950 Plymouth automobile was not in excess of $650 when it was converted to business use in 1957.

The court held that the taxpayer's basis for depreciation of the automobile was its fair market value at the time it was converted to business use. (R. 23-28.)

## SUMMARY OF ARGUMENT

The taxpayer purchased a car, used it for personal purposes for about six years, converted it to business use, and is now seeking to take depreciation deductions on the basis of his original cost of the car. The Regulations and decided cases make it clear that the basis for depreciation of property purchased for personal use and converted to business use is the fair market value of that property at the time of its conversion. A holding that the depreciation basis is the taxpayer's original cost would have the effect of allowing him to deduct the expense of his personal use prior to the conversion from his business income

earned after the conversion since the car certainly depreciated physically as well as in value during his personal use; the Internal Revenue Code specifically forbids the deduction from income of personal expenses. The transfer of property to a partnership simultaneously with the conversion from personal to business use would not seem to affect the application of the Regulations and cases and the taxpayer has not shown why they should not apply.

The taxpayer's main point seems to be that the car had a fair market value of its original cost at the time of its conversion six years after its purchase. The only evidence offered in support of his position was the opinion testimony of his brother who did not purport to be an expert in car valuations. The Stipulation of Facts contained evidence that the fair market value of the car was less than the $650 basis allowed by the Commissioner as the taxpayer's basis for depreciation. Under these circumstances it certainly cannot be said that the Tax Court's findings of fact are clearly erroneous. The decision of the Tax Court should be affirmed.

## ARGUMENT

### The Tax Court Correctly Allowed the Taxpayer a Depreciation Basis for His Automobile of Its Fair Market Value At the Time It Was Converted From Personal To Business Use

The taxpayer acquired an automobile for $2,500 in 1951, used it solely for personal purposes for about six years, started using it in his business in 1957 (R. 19), and is now trying to use his original cost

as his basis for its depreciation. Allowing such treatment is contrary to logic, the decided cases and the Treasury Regulations; the Tax Court correctly allowed him depreciation on the basis of the fair market value of the car at the time he started using it for business use.

Section 167(a) of the 1954 Code (Appendix, *infra*), allows "as a depreciation deduction a reasonable allowance for exhaustion, wear and tear * * * of property used in the trade or business * * *." Section 167 (f)[1] (Appendix, *infra*) provides that the basis for depreciation of any property will be "the adjusted basis provided in section 1011 for the purpose of determining the gain on the sale or other disposition of such property." Section 1011 of the 1954 Code (Appendix, *infra*) refers to Section 1012 (Appendix, *infra*) for "The adjusted basis for determining the gain or loss from the sale or other disposition of property * * *" and the latter section says that such basis "shall be the cost of such property * * *."

In *Heiner* v. *Tindle*, 276 U.S. 582, the Supreme Court interpreted one of the early predecessors to Section 1012. In that case the taxpayer converted his residence into rental property in 1901 and continued to rent it until he sold it in 1920. The Government argued that the applicable Regulations prohibited a deduction for any loss on the sale because

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[1] This provision was redesignated subsection (g) of Section 167 by Section 13(c)(1) of the Revenue Act of 1962, P. L. 87-834, 76 Stat. 960, for taxable years beginning after December 31, 1961, and ending after October 16, 1962.

the property was not (originally) acquired as business or income producing property. The Court held that loss, if any, would be allowed in the amount of the difference between the 1920 selling price of the property and the lower of its March 1, 1913, value or its value on the date it was converted to rental property. Applying the principles, if not the letter, of the statute and the Regulations, the Court held that (pp. 586, 587) "whenever needful the fair market value of the property at the time when the transaction for profit was entered into may be taken as the basis for computing the loss", and that the "transaction" was not the purchase of the property but its "appropriation" to rental purposes. In effect, the Court said that in the case of property converted from personal to business use, its value on the date of its conversion rather than its original cost would be used to determine the amount of loss. Also see this Court's decision to the same effect in *Spriggs* v. *Commissioner*, 290 F. 2d 181; *Parsons* v. *United States*, 227 F. 2d 437 (C.A. 3d); *Perkins* v. *Commissioner*, 41 B.T.A. 1225, affirmed *per curiam*, 125 F. 2d 150 (C.A. 6th). Cf. *Wood* v. *Commissioner*, 197 F. 2d 859 (C.A. 5th). Since under Section 167 (f), depreciation basis is the same as the basis for determining gain or loss, these cases require that the taxpayer's basis here be limited to the fair market value of his car at the time he converted it to business use.

In *Helvering* v. *Owens*, 305 U.S. 468, the Supreme Court held that a taxpayer could take a casualty loss

deduction of the amount of the difference between the fair market value of the property before it was damaged or destroyed and its fair market value after such damage or destruction rather than the difference between cost and value after the casualty as was provided for on the face of the statute and was contended for by the taxpayers. The Court said that the cost basis provided for by the statute contemplated reductions in basis for depreciation, and although no depreciation is allowable on property not used in a trade or business or held for the production of income, Congress intended that the deduction for any loss of such property be limited to the value of such property at the time of the loss. This was true even though, as in the instant case, the statute provided that the basis for determining the deduction was "cost." Section 167(f) provides that the same basis will be used for depreciation as is used for determining gain or loss on the sale of property. Under that provision the taxpayer's basis for depreciation here at the time he converted it to business use was the same as it would have been for determining any casualty loss and in the *Owen* case the Supreme Court said that that basis is the fair market value of the property at the time of the loss. It follows that here the taxpayer's basis for determining gain or loss of any kind and his basis for depreciation of his automobile must be its fair market value at the time it was converted to business use.

Consistent with these cases the following provision was added to the Income Tax Regulations in 1956 (Treasury Regulations on Income Tax (1954 Code), Section 1.167(f)-1 (Appendix, *infra*)):

> Sec. 1.167(f)-1 *Basis for depreciation.*
>
> * * * In the case of property which has not been used in the trade or business or held for the production of income and which is thereafter converted to such use, the fair market value on the date of such conversion, if less than the adjusted basis of the property at that time, is the basis for computing depreciation.
>
> (26 C.F.R., Sec. 1.167(f)-1.)

This regulation is not only consistent with the cases discussed above, it is also consistent with Section 262 of the 1954 Code which provides:

> SEC. 262 PERSONAL, LIVING, AND FAMILY EXPENSES.
>
> Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.
>
> (26 U.S.C. 1958 ed., Sec. 262.)

Allowing the taxpayer to depreciate his car on the basis of his original cost in effect would allow him to deduct personal expense from his business income—if the entire original cost of the car here could be deducted through depreciation, then the business would be taking a deduction for the cost of wear and tear and depreciation in value of the car during the six years the taxpayer used it for personal purposes. The effect of this regulation and the cases discussed above is to disallow the deduction for depreciation and losses to the extent that they are attributable to personal use of property.

The taxpayer does not attack the Regulations or the cases cited above, but rather he tries to get around them by arguing that the conversion of the auto to business use at the time it was transferred to the alleged partnership somehow prevents them from applying to his car. Without getting into the logic problem of whether the "conversion" of property from personal to business use and the "transfer" of that property to a partnership may take place simultaneously, we submit that even if there was a partnership here in 1957, the logic of the Regulations and cases requires the conclusion that the basis for depreciation of the auto in the hands of the partnership was its fair market value at the time of its conversion to business use.[2] Cf. *Perkins* v. *Commissioner*, *supra*. Certainly the taxpayer has pointed to no reason or authority to explain why the established principles governing the basis of property converted from personal to business use should be inapplicable merely because the business use is that of taxpayer's partnership rather than that of taxpayer as an individual. Section 723 of the 1954 Code (Appendix, *infra*), says that the basis of property contributed to a partnership is the adjusted basis of that property in the hands of the contributing partner at the time

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[2] Although we believe the Tax Court's finding that the taxpayer did not prove that he and his brother were partners in 1957 is supported by the evidence in the record and therefore is not clearly erroneous, since we do not see how the existence or lack of existence of the partnership affects the outcome of the case we have not discussed the evidence supporting the Tax Court's finding.

of the contribution. This adjusted basis in the hands of the contributing partner is the basis the Supreme Court said in *Heiner* v. *Tindle*, *supra*, and this Court said in *Spriggs* v. *Commissioner*, *supra*, was the fair market value of the property at the time it was converted to income-producing use under the circumstances present here.[3]

The taxpayer's real complaint (Br. 25-30) seems to be that the Tax Court erred in finding that the fair market value of the automobile was $650 rather than the $2,500 value for which he is contending. The valuation of property is clearly a question of fact.

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[3] On page 13 of his brief the taxpayer quoted a part of a sentence in Treasury Regulations on Income Tax (1954 Code), Section 1.704-1(c)(1) in support of his position. The full sentence reads as follows:

> Sec. 1.704-1 *Partner's distributive share.*
>
> * * * *
>
> (c) *Contributed property*—(1) *In general.* * * * When the partnership agreement is silent as to the treatment of such items with respect to contributed property (and if such property is not an undivided interest as described in section 704(c)(3)), depreciation, depletion, or gain or loss with respect to such property shall be treated in the same manner as though such items arose with respect to property purchased by the partnership. * * *
>
> * * * *
>
> (26 C.F.R., Sec. 1.704-1.)

This sentence was clearly intended to be a guide for the allocation among the partners of deductions or gains of the partnership and does not purport to affect the basis to the partnership of the partnership assets; the basis itself is determined by Section 723 and Treasury Regulations on Income Tax (1954 Code), Section 1.723-1.

Treasury Regulations on Income Tax (1954 Code), Section 1.1001-1(a); *Penn* v. *Commissioner*, 219 F. 2d 18 (C.A. 9th); *Webster Investors, Inc.* v. *Commissioner*, 291 F.2d 192 (C.A. 2d). The Commissioner's determination of fact is presumptively correct and the burden of proving his determination wrong is on the taxpayer. *Clark* v. *Commissioner*, 266 F. 2d 698, 706 (C.A. 9th); Rule 32 of the Rules of Practice, Tax Court of the United States. Finally, the Tax Court's determination of a question of fact must be affirmed unless it is clearly erroneous. *Commissioner* v. *Duberstein*, 363 U.S. 278, 291; *Clark* v. *Commissioner*, *supra; Goldstein* v. *Commissioner*, 298 F. 2d 562 (C.A. 9th).

The taxpayer sought to carry his burden of overcoming the Commissioner's determination by offering testimony of his brother, who was also his alleged partner, that the car was in excellent [4] condition and was worth $2,500 at the time it was converted to business use. (R. 69, 73.)

In the first place the taxpayer's contention that a six year old car is worth as much as it was when it was new is preposterous on its face and is contrary to experience for the years in question. Furthermore, there was no contention that the taxpayer's brother was an expert on car valuations, and the Tax Court would not have been bound to accept his valuation even if he had been an expert. *Dayton P. & L. Co.* v. *Comm'n.*, 292 U.S. 290, 299; *In re Williams' Estate*,

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[4] The taxpayer claimed a deduction for auto repairs in 1957 of $71.04. (R. 19.)

256 F. 2d 217, 219 (C.A. 9th); *Tracy* v. *Commissioner*, 53 F. 2d 575, 577 (C.A. 6th), certiorari denied, 287 U.S. 632; *Archer* v. *Commissioner*, 227 F. 2d 270, 273 (C.A. 5th).

The fair market value of property is "generally defined as that price which a willing buyer would pay a willing seller after negotiations in which neither party was acting under compulsion." *Goldstein* v. *Commissioner*, *supra*, p. 567. The "Official Guide," which listed the average retail price for used automobiles, and newspaper advertisements showed that a car of the make and model of the taxpayer's car could have been purchased in the Honolulu area in 1957 for an average retail price of less than the $650 allowed by the Commissioner as the taxpayer's basis for depreciation. (R. 14-15, 23, Exs. 19-S, 20-T, 21-U.) Thus the Tax Court's finding that the fair market value of the taxpayer's automobile was $650 is supported by the record, is not clearly erroneous and should be affirmed.

Finally, the taxpayer makes two procedural points in his brief. (Pp. 30-31.) First, he argues that the subsequent trade in of the automobile in 1961 (R. 16) renders moot the question of his basis for depreciation in 1957. He cites no authority for this proposition and it is clearly contrary to the statutes and Regulations cited above.

His second point is that the Tax Court erred in denying his motion for reconsideration. His brief gives no reason why he believes the Tax Court erred. Not only was his motion filed beyond the time allowed for filing such a motion without special leave of the

court (R. 30), which apparently was neither requested nor granted (Rule 19(e) of the Rules of Practice, Tax Court of the United States), but his motion contained nothing but his analysis of the applicable law and facts, both of which he had ample opportunity to explore at the original hearing. Under these circumstances the Tax Court did not abuse its discretion in denying his motion. Cf. *Bankers Coal Co.* v. *Burnet*, 287 U.S. 308; *Weiller* v. *Commissioner*, 64 F. 2d 480 (C.A. 2d).

## CONCLUSION

The decision of the Tax Court should be affirmed.

Respectfully submitted,

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December 1963.

## CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated:.....day of....., 1963.

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STEPHEN B. WOLFBERG

## APPENDIX

Internal Revenue Code of 1954:

SEC. 167. DEPRECIATION.

(a) *General Rule.*—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

* * * *

(f) *Basis for Depreciation.*—The basis on which exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be the adjusted basis provided in section 1011 for the purpose of determining the gain on the sale or other disposition of such property.

* * * *

(26 U.S.C. 1958 ed., Sec. 167.)

SEC. 723. BASIS OF PROPERTY CONTRIBUTED TO PARTNERSHIP.

The basis of property contributed to a partnership by a partner shall be the adjusted basis of such property to the contributing partner at the time of the contribution.

(26 U.S.C. 1958 ed., Sec. 723.)

SEC. 1011. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis (determined under section 1012 or other applicable sections of this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses)), adjusted as provided in section 1016.

(26 U.S.C. 1958 ed., Sec. 1011.)

SEC. 1012. BASIS OF PROPERTY—COST.

The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapters C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses). The cost of real property shall not include any amount in respect of real property taxes which are treated under section 164(d) as imposed on the taxpayer.

(26 U.S.C. 1958 ed., Sec. 1012.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.167(f)-1 *Basis for depreciation.*

The basis upon which the allowance for depreciation is to be computed with respect to any property shall be the adjusted basis provided in section 1011 for the purpose of determining gain on the sale or other disposition of such property.

In the case of property which has not been used in the trade or business or held for the production of income and which is thereafter converted to such use, the fair market value on the date of such conversion, if less than the adjusted basis of the property at that time, is the basis for computing depreciation.

(26 C.F.R., Sec. 1.167(f)-1.)

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No. 18913

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED A. ALEXANDER, LOUIS P. CAMAROTA, GEORGE CATHRO, ALBERT S. DIMOND, LEWIS FREEMAN, RANK MARANI, RAY C. MARVIN, JAMES NEWELL and EARL D. PETERSEN,

Appellants,

-vs-

PACIFIC MARITIME ASSOCIATION, a non-profit corporation; INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, an unincorporated association; SHIP CLERKS ASSOCIATION, LOCAL 34, ILWU, an unincorporated association; JOINT CLERKS LABOR RELATIONS COMMITTEE, SAN FRANCISCO, an unincorporated association; H. J. BODINE, L. B. THOMAS, WILLIAM CHESTER, K. F. SAYSETTE, J. A. ROBERTSON and HUBERT BROWN as Trustees of ILWU-PMA WELFARE & PENSION FUNDS; HARRY BRIDGES, H. J. BODINE, L. B. THOMAS, K. F. SAYSETTE, R. J. PFEIFFER, and CAPT. C. PRYOR as Trustees of ILWU-PMA MECHANIZATION FUND; DOES ONE thru TWENTY,

Appellees./

On Appeal from the United States District Court
for the Northern District of California
Southern Division

BRIEF FOR APPELLANTS

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IN THE

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## JURISDICTIONAL STATEMENT

This is an appeal from an Order of the District Court dated July 19, 1963, denying the plaintiffs' Motions for Sanctions, for failure to answer interrogatories ordered by the District Court. It granted a Summary Judgment for arbitration, and stayed all proceedings. The Order of July 19, is in effect a final and appealable judgment, made upon conflicting affidavits.

Goodall-Stanford, Inc. v. United Textile Workers, 353 U.S. 550, 11 L Ed 2d 1031, 77 S Ct 920.

Appellate jurisdiction of this court is based upon 28 USCA 1291. The plaintiffs' Federal Court jurisdiction is based on Sec. 301 of the National Labor Relations Act, 29 USCA 185, (Breach of Collective Bargaining Agreement), 28 USCA 1331 (federal question) and 28 USCA 1337 (commerce) and 29 USCA 301, et seq. (welfare and pension trust provisions).

If this order of July 19, 1963 (R-182) appealed from be considered an order under 9 USCA 3, Federal Arbitration Act (which has no application) or a stay of the plaintiffs' legal action under Sec. 301 pending arbitration, it would be an appealable order to this Court under 28 USCA 1292 (1). See Ross v. Century Fox Film Co., 9 Cir 1956, 236 Fed 2d 632.

This same case was before this court in ALEXANDER, et al., v. PMA, et al., No. 18324 decided February 28, 1963 in 314 Fed 2d 690.

The current appeal is from the District Court Order of July 19, 1963 (R-182). This order is a final judgment, and appealable (see Goodall-Stanford, Inc. v. United Textile Workers, 353 U.S. 550, 11 L Ed 2d 103, and this final judgment was made upon conflicting affidavits, and upon an alleged admittedly oral agreement (contended by defendants), and not upon a written contract, and this judgment was made without an opportunity for a trial upon the issues of fact.

## STATEMENT OF FACTS

Upon the filing of the mandate with the District Court, upon the decision of this court, 314 Fed 2d 690, and pursuant thereto, the plaintiffs filed their amended complaint (R-20), an action upon the collective bargaining agreement in accordance with the decision of this court, and Doyle Smith v. Evening News Association, 371 U.S. 195, 9 L ed 2d 246. Plaintiffs had filed interrogatories under Rule 33 in September, 1962, and they re-filed to start the running of the time on April 26, 1963 (R-54). These interrogatories (R-6) sought to determine the sources of evidence available for discovery, and many were addressed to the evidences of the collective bargaining agreement, the portions in writing, and the portions the defendant claimed were oral, and the persons having knowledge thereof, and the portions the defendants claimed were based on customs, etc., and the persons having knowledge thereof to take the testimony upon oral depositions; the persons who were trustees of

the various funds under the agreement, and related matters such as registration, and the correlation between registration and membership in the defendant union, Local #34.

On May 10, 1963, the Honorable W. P. Sweigert, United States District Judge (R-84) made his order requiring the defendants to answer these interrogatories. This order on page 3 (R-86) held:

> "An examination of the interrogatories addressed to defendant Pacific Maritime Association, reveals that they are relevant to the issues framed in the plaintiff's amended complaint.
>
> The Court also considered the defendants' objections to the interrogatories as continuing. However, in view of the decision of the Court of Appeals and the decision in Smith vs. Evening News Assn., Supra, the amended complaint can no longer be considered as "practically identical" with the state action. The original complaint filed in the United States District Court charged defendants with discriminatory conduct; the amended complaint alleges a breach of a collective bargaining agreement. The relevancy of the interrogatories is to be determined under the amended complaint."

On May 1 and 8, 1963 and on June 10, 1963, the deposition of J. PAUL ST. SURE, President of PMA, was taken to determine the contentions of the defendant PMA as to the various matters, particularly the collective bargaining agreement covering clerks, and to discover the other matters that were within this PMA official's knowledge, and to discover the source of documents and other witnesses who could be examined upon oral depositions. This transcript with exhibits, of MR. ST. SURE'S deposition, is a part of this record,

and was considered by the United States District Judge in making his order on appeal (R-56).

On June 7, plaintiff's counsel noticed a Motion for June 17 to impose sanctions for failure to answer the interrogatories under Rule 33, pursuant to the written order of Judge Sweigert of May 10, 1963 (R-131). The first part of the order appealed from, of July 19, 1963 (R-182) summarily denies this motion, and in addition it makes a judgment, clearly appealable, staying all proceedings, under the defendant's motion for summary judgment, and stay pending arbitration. The order appealed from of July 19, 1963 (R-182), further orders that all remaining motions submitted by the defendants be stayed pending disposition of the case on arbitration.

The amended complaint (R-20) is one for breach of the collective bargaining agreement. The first count alleges that the defendant ILWU is an unincorporated association and labor union, with its principal place of business in San Francisco, and was a plaintiffs' agent for hire, and that said union is the exclusive bargaining agent under 29 USCA 151 et seq. It alleges that PMA is an unincorporated association, with its principal place of business in San Francisco, and that it conducts business as such for its members who are employers of ship clerks in the Port of San Francisco. The amended complaint alleges that there is a collective bargaining agreement covering the hours, compensation, and working conditions and terms of employment of ship clerks on the Pacific Coast, including the Port of San Francisco, and the agreement is wholly in writing

and executed by the defendant ILWU as bargaining representative; that the agreement consists of eleven documents enumerated in the amended complaint, commencing with the "Master Agreement for Clerks, etc." of April 1952. The amended complaint quotes the provisions of the Master Agreement, that it cannot be amended, modified, changed, altered or waived, except by a written document executed by the parties.

The amended complaint alleges this agreement not only provides for hourly pay as part of the individual compensation, but also provides for deferred contingent compensation in the form of monies paid into trust funds within the provisions of 29 USCA 186 and 301, et seq. It alleges that one of the provisions of the collective bargaining agreement is the payment of the employer to the welfare and pension funds for the benefit of all employees in the industry, upon each hour of work performed by each clerk employed under the agreement, including each individual plaintiff's employment. The amended complaint (R-22) alleges there is paid by the employers of each employee, including the plaintiffs, (and disbursed by the defendant PMA for its members) annual vacation pay to those on the regular working force who have worked 700 hours or more in the preceding calendar year. It is also alleged that a part of the compensation under this contract is to be paid into the Mechanization Fund under the provisions of the Federal law applicable to employee trust funds, the lump sum of $1,500,000 on or about June 15, 1960,

and an annual contribution of $5,000,000, payable in June each year, for each of the following 5-1/2 years, which fund is for the purpose of providing death benefits or retirement funds if the employee lives to retirement, and to guarantee employment at straight time pay for 35 hours each week for each person in the permanent working force of the maritime industry of the Pacific Coast, who were so employed in 1958.

The amended complaint (R-23) alleges that the ship clerks in the Port of San Francisco are engaged in the flow of interstate and foreign commerce through the Port of San Francisco, and that the plaintiffs were and are full-time employees for a varying period for each of the nine plaintiffs from six to twelve years; that each of the plaintiffs worked for said years, and each is now available for such work, and each is skilled as a ship clerk, and a member of the permanent working force of the ship clerks in the Port of San Francisco, and is dependent chiefly upon the employment as ship clerk for his livelihood, and was and is available for dispatch on ordinary working days during ordinary working hours, from the hiring halls maintained under the bargaining agreement.

The amended complaint alleges that under this agreement, there was and is created an unincorporated association, one-half of the members are selected by the employer, and one-half by the union, known as the Joint Clerk Labor Relations Commitee, San Francisco, and this defendant COMMITTEE acts by one vote for the

employer and one by the union, and both votes are necessary for action by the committee, and this defendant COMMITTEE runs and maintains the two hiring halls from which ship clerks are dispatched and has control of the "registration" lists in the Port of San Francisco, making additions and subtractions thereto.

The amended complaint (R-24) alleges that the bargaining agreement contains provisions that those who constitute the full-time working force and depend upon this work for their livelihood are designated as "registered" ship clerks to distinguish them from those who are only seasonal or occasional members of the working force of ship clerks and who depend upon other employment for their principal livelihood. The amended complaint sets forth hoc verba the relevant portions that registration shall be by "mutual consent;" it permits either party, PMA or ILWU Union to demand additions or subtractions as may be necessary to meet the needs of the port; and when objecting to any registration, the member of the COMMITTEE shall give his reasons therefor. It provides that when men are dropped from the list, it is done on a seniority basis. There is also set forth hoc verba, the provisions of the contract granting preference to registration. It also alleges hoc verba, the portions of the contract granting preference of employment and dispatch to those who were registered on June 1, 1951. It also quotes hoc verba from the contract, that there shall be no favoritism or discrimination in hiring or dispatching. It sets forth hoc verba, the provision that no one shall be dispatched as a clerk, while any clerk on the registered list is

qualified, ready and willing to work. The amended complaint also sets forth hoc verba the provision in the collective bargaining agreement that there shall be no discrimination against any person by reason of membership or non-membership in the union. The amended complaint also alleges that a portion of the written agreement as to registration requires there is to be maintained an adequate registered working force of ship clerks.

The amended complaint (R-26) alleges that the defendant LOCAL #34 is an unincorporated association, and the defendant ILWU both act as agent for hire and compensation therefore by the plaintiffs, and as exclusive bargaining agents, and this Local is delegated the administration of the agreement in the Port of San Francisco, and is employed by the plaintiffs as an agent for hire and compensated therefor.

The amended complaint (R-26)sets forth that the defendant LOCAL #34 selects and directs the employee member of the defendant Joint Committee; that without the vote of the employee member, no person can be registered as a ship clerk by the defendant COMMITTEE, and that by this mechanics LOCAL #34 has prevented additions to the names of registered ship clerks in the Port of San Francisco, notwithstanding the provisions as to registration and provisions for an adequate working force, and the defendant Union by withholding the approval to individual registration has and does now limit the number of names enrolled as "registered" to approximately one-half of the total persons constituting the full-time working force, and to the number needed to constitute an adequate working force. It alleges

that during the existence of the agreement to the present time, this defendant UNION through its representative on the COMMITTEE, arbitrarily restricts its consent involving fully registered ship clerks, solely to applicants who are full-book members of LOCAL #34 in violation of the terms of the agreement, and in violation of the duty as plaintiffs' agent for hire and as statutory collective bargaining agent.

The amended complaint (R-27) sets forth that the defendant ILWU and the defendant LOCAL #34 and the employee members of the defendant COMMITTEE violate the provisions of the contract against discrimination by acts of planned, purposeful and hostile discrimination against the plaintiffs for the sole reason that the said plaintiffs and each of them were not and are not now full-book members of the defendant Unions or either of them, although the plaintiffs and each of them have sought membership therein as full-book members, are qualified for such membership, and would be members except for the arbitrary refusal of the said Unions, and each of them to admit the plaintiffs who have complied with all conditions precedent for such membership.

The amended complaint (R-27) alleges that the defendant UNION and the employee members of the defendant COMMITTEE have breached the collective bargaining agreement by failure to enter on the COMMITTEE'S list of "registered" ship clerks in the Port of San Francisco the plaintiff's names, by failure to dispatch the plaintiffs without discrimination, and by failure to maintain the list of ship clerks at an adequate number as in the contract provided. It is also alleged that the defendant COMMITTEE has breached said agreement by failure to

register an adequate number, notwithstanding demands by the employer for an adequate registration of ship clerks in said port, and said breaches in each of them were done to grant preference to those ship clerks who are full-book members of LOCAL #34.

The amended complaint (R-27) alleges that the written bargaining agreement in effect on June 1, 1951 was a bargaining agreement known as the Pacific Coast Longshore Agreement dated 6 December 1948, and supplemented by the ship clerk's agreement of January 17, March 11 and March 25, 1949, which by its terms granted and gave preference of registration and employment to LOCAL #34 union membership. As a result thereof, only union members were fully "registered" as ship clerks on June 1, 1951. That the said prior written collective bargaining agreement in effect on June 1 of 1951 was determined illegal and void in proceedings involving the UNIONS in 90 NLRB 1021, 98 NLRB 284, and the adjudication of the Ninth Circuit in 211 Fed 2d 946 by reason of said preference of employment and registration. These adjudicated illegal provisions in effect on June 1, 1951 are blanketed in and carried into the current bargaining agreement by the seemingly innocent seniority date of June 1, 1951 and the granting of priority of employment dispatch to those registered. This illegal provision is further carried out by the defendant COMMITTEE'S refusal to approve sufficient registrations in the port, and to arbitrarily restrict all registrations since that date to full-book union membership in LOCAL #34. That by keeping the registrations to approximately one-half of the full-time working force dispatched from day to day,

and by keeping "registration" coextensive with full-book LOCAL #34 membership, the union members are dispatched from the hiring hall under priority, and keep employment under this priority, and as consequence obtain and hold by priority of employment the more sought after, and the far more profitable employment as ship clerks. This giving of the uncontrolled discretion to the UNION through its employee member of the defendant JOINT COMMITTEE "in consent" to registration of ship clerks by requiring "mutual consent" of both the employer and the employee member to each individual registration, is illegal and void.

The amended complaint (R-29) alleges that within the four years last past on numerous occasions and on June 26, 1962, each of the plaintiffs duly and regularly requested that he be duly registered as a ship clerk and enrolled as such on its records under the bargaining agreement. The defendant COMMITTEE wrongfully refused and failed without just cause or excuse to enroll the plaintiffs or any of them as registered ship clerks, but registers others who joined the working force of ship clerks subsequent to the plaintiffs in violation of the agreement. It alleges that the plaintiffs DIMOND, FREEMAN and NEWALL were at one time "registered" in the maritime industry, and were deregistered without cause, and without notice by the defendant UNION arbitrarily removing their names from the list of "registration," probably for want of union membership in LOCAL #34. It is alleged that the plaintiffs are entitled to "registration" in preference therefore under the contract which is violated by the defendant UNION'S failure

to follow said contract provisions. It alleges that the defendant COMMITTEE has and does now fail and neglect to make the ministerial act of entering the plaintiff's name in the r egistration list of full-time ship clerks employed in the Port of San Francisco to designate each as a member of the permanent working force as provided in the contract. It further alleges that at no time when applications for "registration" or requests for "registration" were made, did the JOINT COMMITTEE or any of its members ever state to the plaintiffs or any of them, or otherwise, any grounds or reasons or objections to any of the plaintiffs' registration as provided in the contract, and did thereby breach the contract.

A mended complaint (R-30) sets forth that each of the plaintiffs is a party to the collective bargaining agreement, and the agreement was made for the benefit of each. That this collective bargaining agreement is incorporated in and made a part of each of the plaintiff's employment on each individual dispatch as such ship clerk. It alleges that the plaintiffs have duly and regularly contributed their portion of the maintenance of the hiring hall as provided in the contract, and that as part of the contract of hiring of the defendant UNION S by the plaintiffs, plaintiffs have duly paid and contributed assessments for "caucuses and representation" to the defendant ILWU and the defendant LOCA L. These assessments and contribution are identical with and varies from month to month with the full-book LOCA L 34 members dues and assessments. Actually, the plaintiffs pay identical sums to the UNION under this assessment for maintenance of hiring hall and other union assessments as full-book

members pay for dues and assessments, although they are not full-book members, nor permitted this membership.

The amended complaint (R-30) alleges that in addition to the so-called "preferred" employees employed on a monthly basis, who are for the most part supervisory employees in the maritime industry, and who are full-book members of LOCAL 34, there are approximately 450 men who constitute the full-time working force of ship clerks in the Port of San Francisco available for and normally dispatched from day to day from the two hiring halls in the Port of San Francisco under the collective bargaining agreement. The amended complaint alleges that 235 of the 450 are "registered" and are also full-book members of LOCAL 34, and that approximately 215 of the permanent working force, or 48%, including the plaintiffs, are nonetheless full-time employees and members of the working force, but are arbitrarily discriminated against and not "registered," nor are they permitted this full-book union membership. It is alleged that the defendant LOCAL 34 has determined that there is and has existed a necessity for a substantial increase in the number of registered ship clerks in the Port of San Francisco, but for the purpose of maintaining this preference for its full-book members as part of this planned, purposeful and hostile discrimination against the plaintiffs, both as the statutory bargaining agent and as plaintiffs' agent for hire, in violation of its contractual duty as such agent for hire, said LOCAL has and does now violate the said contract by both refusing to follow the terms of the said bargaining contract as to registration and preference therefor, and also to maintain an adequate working force as provided by

the written agreement.

The amended complaint sets forth a second cause of action (Declaratory Relief) starting at R-31, and re-alleges the first cause of action, par. 1 through 18. It then alleges that the plaintiffs are informed by the various shipping companies and stevedoring companies as their individual employers, to which the plaintiffs have been and are now being dispatched, and that such employers who are members of the defendant PMA, pay to PMA the full compensation provided by the collective bargaining agreement on each of the plaintiff's employment, including the so-called "Eight-hour Rule," the welfare and pension payments generated and computed on an hourly basis on each of the plaintiff's services, and payments for the Mechinization Fund, by each of the employers, upon the plaintiff's work; and for vacation pay under the collective bargaining agreement on each of the plaintiff's hours of work in their said individual employment. The defendant PMA, although collecting this money from the individual employers, does not pay the plaintiffs according to the collective bargaining agreement, but on the contrary PMA pays the full-book members of LOCAL 34 according to the contract, but does not pay the plaintiffs or any of them such compensation remitted by the employers for their work, in the event the hold of the ship is loaded or the plaintiffs' individual dispatch is terminated prior to eight hours, in accordance with the "Eight-hour Rule," wherein a ship clerk is paid for eight hours of work if he works on any single day more than four hours but less than eight. It is alleged that the plaintiffs are informed through their counsel by counsel for PMA that the Welfare and Pension Fund contributions are

immediately remitted by PMA to the defendant trustees for the fund, including monies contributed by the plaintiffs' individual employers. It is alleged that defendant PMA does not pay any portion of the vacation pay or the Mechanization Funds to the plaintiffs or for their use or benefit.

The amended complaint (R-32) sets forth the individual defendant members of the Welfare and Pension Fund, and that this Welfare and Pension Fund was to be used for the benefit of all persons working under the collective bargaining agreement, including the plaintiffs, and the trust terms thereof and the collective bargaining agreement provide for the purchase of contracts of insurance for each of the employees including the plaintiffs, and to pay group medical, surgical and hospital benefits under the Kaiser-Permanente Health Plan for all employees including the plaintiffs and their immediate families, and for dental benefits for dependent children of such beneficiaries, and for supplementary maternity benefits for such beneficiaries. The amended complaint alleges that these payments were made and the benefits furnished the plaintiffs until 1958, when the defendant TRUSTEES breached the contract, and thereafter failed, refused and neglected to either purchase the insurance contracts or the group hospital, medical and surgical and other benefits for the plaintiffs, or any of their dependents. It is further alleged that on February 28, 1962, the defendant ILWU in violation of its duty as plaintiffs' agent for hire and its duty as exclusive collective bargaining agent for all ship clerks including the plaintiffs, agreed with the defendant PMA, who well knew of this violation of duty, to amend the Welfare and Pension Fund portions of the collective bargaining agreement

retroactive as of June 1, 1961, so that only an arbitrary portion, to wit the 52% of the ship clerks who were full-book members of LOCAL 34, would receive all of the benefits of such trust. It is alleged that this is a violation of the Federal statutes applicable to such Welfare and Pension Funds, and the defendant TRUSTEES have and do now use said funds including the compensation generated upon the plaintiffs' services from their individual employers for only the 52% of the ship clerks who have full-book membership in LOCAL 34, and not for all employees in said working force.

Amended complaint (R-33) alleges the defendants who are trustees of the Mechanization Fund. It is alleged there has been created for the purpose of violating the said contract, two funds consisting of the said defendant trustees designated as trustees of the "Vesting Benefit Fund," and the same defendants as trustees of the "Supplemental Wage Benefit Fund," an unfunded trust. It is alleged that in violation of the contract, PMA disburses directly to 410 individuals; nevertheless the defendant trustees stating in their report to the Department of Labor, that there are 1390 more who will be eligible but are not currently receiving benefits, and such funds are disbursed in the name of the trustees from the accounting office of PMA at 16 California Street, San Francisco, to said unknown 410 beneficiaries. It is alleged that the defendant PMA has disbursed in the defendant trustee's name and in violation of the contract, during the year 1960, the sum of $3,000, and during the year 1961, $7,521.40, and during the year 1962, $814,870 in the name of the trustees as disbursements under said "Vesting Benefit Trust Fund" as an "unfunded plan," and that the defendant PMA has disbursed to the said trustees who purport to hold under "Supplemental Wage Benefit Fund"

That no part of said "Supplemental Wage Benefit Trust Fund" has been or now is being disbursed or paid to any person. It is alleged in the amended complaint that in violation of the collective bargaining agreement, these defendant trustees have not paid the plaintiffs any part, although the plaintiffs have not, by reason of other breaches of the contract herein set forth, had the 35 hours of minimum work, and are entitled to benefits therefor for some months prior to this action.

It is alleged in the amended complaint (R-34) that the balance of the $11,500,000 Mechanization Fund payable to and including June 1962 is held:

a. By the Welfare Fund trustees in the sum of $3,670,926, in contravention of the agreement, but for the purposes of the Mechanization Fund under the October 18, 1960 Supplement Agreement;

b. By defendant PMA in the sum of $3,040,170, unpaid in contravention and in breach of the agreement, but nevertheless collected under said collective bargaining agreement from its members for work performed by the plaintiffs and others in the maritime industry, and said sum is held by the defendant PMA in contravention of and in violation of both the contract and the Federal statutes applicable to Welfare Funds.

Amended complaint (R-34) sets forth that the Mechanization Agreement Supplement dated October 18, 1960 provides for payment of $1,500,000 payable by the employers in 1960, and $5,000,000 per year payable each year subsequent thereto, for a period of 5-1/2 years, and provides that the fund shall be used solely for the benefit of the full-time working force of the maritime industry including ship clerks employed in 1958, of which the plaintiffs are part, for the

purpose of guaranteeing full-time employment and straight pay to all in the group, and to provide death benefits of approximately $5,000, a voluntary retirement benefit of approximately $7,950 upon retirement. It is alleged that the defendant UNION in violation of its duty as a plaintiffs' agent for hire and compensation by the plaintiffs, and as exclusive bargaining collective agent for all ship clerks, both union and non-union, with full knowledge of the defendant PMA of said employment, and said duty as such agent, made as a part of said agreement of October 18, 1960, a provision that said benefits would not be used for all employees employed in 1958, but would be arbitrarily restricted to those employees designated as "registered" and thereby exclude benefits from the plaintiffs and all other non-union employees; and that said restriction is in violation of the Federal statute applicable to such funds.

Amended complaint (R-35) sets forth that by the mechanics and practices set forth in this complaint, the defendant COMMITTEE and the defendant UNION violated and breached the collective bargaining agreement as follows:

1. By discriminating against the plaintiffs and others who were and are non-union employees in both "registration" and dispatch in violation of the specific terms of the contract;

2. By failure to maintain the number of "registered" at an adequate number to provide adequate working force of ship clerks in the Port of San Francisco on such registered list, in order to give preference to said full-book members of LOCAL 34;

3. By making "registered" coextensive with said defendant ILWU, LOCAL 34, full-book membership.

4. By failure to meet the demands of the employers for an adequate registered working force;

5. By giving priority of dispatch to those who are full-book members of LOCAL 34 in violation of the terms of the contract;

6. By limiting the selection of employee members of the defendant COMMITTEE solely to votes of those who were full-book union members, and permitting only full-book members of LOCAL 34 to vote.

7. By restricting the election of the dispatchers who actually hand out the individual jobs in each of the hiring halls on each dispatch, to dispatchers selected solely by an arbitrary group limited to those who are full-book members of LOCAL 34, and not permitting the plaintiffs and others who are not full-book members to vote for or take part in the selection and election of such dispatchers;

8. By keeping in effect "registration" of ship clerks who were "registered" under the illegal provisions of the prior contract, so held illegal as to such union membership preference of registration and employment;

9. By violating the contract and by not following the provisions as to preference and priority and provisions as to registration, the said defendants grant an unlawful preference in dispatch and employment to those having this arbitrary and unlawful preference, and in addition, said defendants do not dispatch equally and without discrimination all of those qualified and eligible under the contract, including the plaintiffs.

Amended complaint (R-36) sets forth that the ILWU in violation of its duty as agent for hire and compensation paid by the plaintiffs, and its duty as an exclusive bargaining agent to act impartially for all employees,

both union and non-union, and with knowledge of the defendant PMA of the defendant's said violation of its duties. Said defendants provide in the collective bargaining agr eement that all matters of arbitration and mechanics for handling of grievances in connection with registration, dispatch, and all other matters are denied and prevented the plaintiffs and each of them who are not "registered" as ship clerks by the said defendant COMMITTEE.

It alleges that on June 26, 1962 each of the plaintiffs, through their counsel, wrote each of the defendants, and in writing requested that if they or any of them knew of any mechanics for grievance or arbitration in the collective bargaining agreement covering any matters in dispute, the plaintiffs would welcome the mechanics of arbitration to solve these disputes or any phase of them. That the defendants and each of them refused to reply to said communication, and the plaintiffs filed this action on August 13, 1962.

Amended complaint (R-37) sets forth a justiciable contraversy between the plaintiffs and the defendants and each of them concerning the terms of employment, dispatch, compensation, and the said collective bargaining agreement, and the rights and duties thereunder arising from the breach of the contract as follows:

1. Plaintiffs contend the bargaining agreement consists solely of the written documents aforesaid, on the contrary the defendants and each of them contend the bargaining agreement is subject and is changed and added by secret oral understandings between ILWU and PMA, and is not confined to the written memorials constituting the bargaining agreement, and the defendants and each of them have by their continued breaches

waived the provisions of the contract, not only as to the matters which the plaintiffs and their individual employers relied upon as the disclosed and known collective bargaining agreement in each dispatch, but as to all matters so breached by the defendants' unlawful conduct. In this respect, the plaintiffs contend that the provisions of the contract requiring it to be changed only by writing, is a sufficient demand under the Taft-Hartley Act to require any changes to be reduced to writing; and that the Landrum-Griffin Act requires the entire collective bargaining agreement to be in writing, so that it may be inspected and known by the employees including the plaintiffs, otherwise the provisions of Congress in said Act are meaningless.

2. The plaintiffs contend that each of them under the collective bargaining agreement, as members of the full-time labor force of ship clerks available for dispatch from the hiring halls in the Port of San Francisco, were and are entitled to the status of "registration" as provided by the bargaining agreement, and that the failure to enter their names on the "registration list" is a breach of the contract. Plaintiffs further contend that discrimination against them as non-union ship clerks is a violation of the collective bargaining agreement, and the plaintiffs contend that in making "registration," the defendant COMMITTEE must follow the priorities therefore in said agreement, and failure to do so is a breach of the contract. Plaintiff contends that the collective bargaining agreement requires an adequate number of "registered" ship clerks, and failure to maintain this number is a breach of the contract. Plaintiffs contend that upon demand of the employers to increase the number of ship clerks in the Port, a failure to increase such number is a violation of said contract,

and on the other hand, the defendants and each of them contend there are two classes of employees, those which the defendant COMMITTEE designates as "registered" and who constitute approximately one-half of those in the permanent working force dispatched from the two hiring halls, and who by this mechanics and practice receive special preference and who receive greater compensation, whereas the plaintiffs and others are subject to discrimination and are compensated at a lesser rate.

3. The plaintiffs contend that the current collective bargaining agreement is invalid insofar as it blankets in and perpetuates the "registration" in effect on June 1, 1951, made under the illegal provisions granting preference of employment and registration to union members, so held invalid by the NLRB and adjudicated void and illegal by the Ninth Circuit Court of Appeals. On the contrary, the defendants and each of them contend that said provisions in the current bargaining agreement granting preference are valid and binding, and registrations made under the illegal provisions of the prior agreement, confined to union membership, remain in full force and effect.

4. Plaintiffs contend they and each of them are entitled to equal dispatch from the hiring hall under the valid terms of the bargaining agreement, without discrimination and equally under said agreement, and without discrimination by reason of lack of union membership, by express provision of the collective bargaining agreement. On the other hand, the defendants and each of them contend that the hiring halls and their facilities under the provisions of the said bargaining agreement shall be and are used to grant preference to those whom the COMMITTEE arbitrarily enters on the list as "registered" irrespective of the requirements of preference

of registration in the agreement. In this respect, the defendant COMMITTEE, the UNIONS and PMA contend that the agreement requires and authorizes them to dispatch ship clerks to jobs in the following order of preference, and for retaining employment on this basis:

a. Fully registered (Class A) ship clerks "registered" on June 1, 1951 (under the prior contracts void because of preference of registration to LOCAL 34 full-book members);

b. Fully registered (Class A) ship clerks "registered" since June 1, 1951 whether under the prior invalid agreement, or under the present agreement;

c. Other "registered" ship clerks (designated by the defendant COMMITTEE as Class B);

d. Longshoremen, members of LOCAL 10, ILWU, who on that particular date have either not been dispatched or did not choose to be dispatched as Longshoremen, and who are physically present in the clerk's hiring hall;

e. Such other persons, whether experienced or not, as a dispatcher elected as aforesaid may, for reasons personal to the individual dispatcher choose to dispatch, even though members of the full-time working force including the plaintiffs are available in the hall for dispatch;

5. Plaintiffs contend that they as parties employing and compensating such agents, the defendant ILWU and the defendant LOCAL, and as non-union ship clerks represented by the said defendants as the exclusive bargaining agent under the Taft-Hartley Law, are entitled to be represented in such bargaining agreement negotiations and in the administration of the collective bargaining agreement, without discrimination, faithfully and

equally, according to the laws applicable to agents for compensation for hire, and according to the rules applicable to statutory collective bargaining agents, and that any abuse of this fiduciary relationship to obtain preference for any group or class of employees, or any planned, hostile and purposeful discrimination against the plaintiffs as such principals, under a contract for hire, or as either employees or as non-union employees, is improper and the plaintiffs are entitled not only to their action at law for breach of the duty, but the Court will and must protect the plaintiffs in the construction and enforcement of the collective bargaining agreement from such abuse and from such acts of the defendants. That the PMA deals with the UNION in making changes in the administration of the collective bargaining agreements, well knowing that the defendant UNIONS are both agents for hire, compensated by the plaintiffs, and also the employees' exclusive bargaining agent, and that the authority of such agents are limited accordingly, and that any contracts it makes with such knowledge and any such transactions it makes in the administration of the collective bargaining agreement, is done with knowledge of each agent's limitation of authority. On the other hand, the defendants and each of them contend that their actions, though they grant unconscionable and unlawful preferences by this mechanics in preference of jobs, and in compensation for work performed thereunder, and that their actions permit the selection and election of employee members of the defendant COMMITTEE, and of hiring hall dispatchers only by approximately one-half of the working force, and prevents the use of arbitration or grievance machinery in all matters involving the plaintiffs, is nevertheless valid, and the plaintiffs and none of them have any right in equity or in law to demand the ILWU to perform its duty as an agent for hire compensated by the plaintiffs, or

as exclusive collective bargaining agent under the Taft-Hartley Act, nor as agents under any fiduciary duty.

6. Plaintiff contends that they are entitled to the contract pay and compensation as ship clerks, as set forth under the collective bargaining agreement, whether or not the defendant COMMITTEE has made the actual act of entering the plaintiff's name as "registered" on the committee's list, and particularly the right to be paid according to the bargaining agreement under the Eight-hour Rule, and for the deferred continued compensation under the Welfare and Pension Fund, and that any attempted retroactive change in the agreement is void and under Federal law applicable to such funds, such benefits cannot be restricted by any mechanics, solely to those having full-book membership in LOCAL 34. Plaintiffs contend that all benefits including wages generated on their individual employment cannot be paid into a fund to be used exclusively for such union members, and they further contend that the sums and benefits accrued under the attempted change in February 1962 are benefits to which the plaintiffs and each of them are entitled by express terms of the collective bargaining agreement. Plaintiffs contend that the Mechanization Fund monies are considerations for contracts made for and on behalf of the plaintiffs and all other employees, and that monies generated on the employment of the plaintiffs and all other employees entitle the plaintiff and all of the employees to their equitable interest in the funds and to the benefits thereunder, and that said benefits cannot be restricted in violation of Federal statute, solely to employee-union members. Plaintiff and each of them claim they are entitled to the vacation pay under the collective bargaining

agreement, each having worked for the necessary hours in each year. On the contrary, the defendants contend that the plaintiffs solely because of said defendant COMMITTEE'S failure to enter the plaintiffs' names on the list of "registered ship clerks" and said COMMITTEE has only entered as registered, an arbitrary part of the working force restricted to those having full-book union membership, the plaintiffs are not entitled to any of the deferred contingent or other benefits to be paid under the collective bargaining agreement, but that PMA may and does keep for itself any funds from the individual employers for compensation on plaintiffs' labors, including funds for deferred contingent and other benefits for vacation pay and Mechanization Fund payments, and the trustees of the Welfare Fund can and does properly refuse to pay for or provide any benefits to the plaintiffs under the terms of the collective bargaining agreement, because they are not union and "registered" clerks. Said defendants of the Fund contend they properly use the funds only for union members to the exclusion of all other employees on whose work said funds were generated, earned and paid, including the plaintiffs.

7. Plaintiffs contend that there should be no discrimination by reason of age between the ages of 40 and 64 as provided in 1961 Statutes of California Chapter 1623. on the contrary, the defendants and each of them contend that in "registration," making lists of regular working force of ship clerks dispatched with preference to jobs, they not only can but do consider such of the plaintiffs as are 50 to 64 years of age, and disqualify them solely by reason of age, but nevertheless the defendants do take other persons who are acceptable to LOCAL 34 into full-book membership, and do not disqualify them because of age, and register them and grant them

this preference, although some of these persons are between the ages of 50 and 64.

The amended complaint (R-43) alleges that the Mechanization Agreement supplement has and does now reduce the amount of work available, and that as a result of the discriminatory practices against the plaintiffs in violation of the contract, and the said improper construction of the bargaining agreement, since the Fall of 1961, the plaintiffs and each of them are now dispatched only occasionally as such ship clerks from the hiring halls.

The third count is alleged in the amended complaint (starting R-43), and it re-alleges the allegations of counts one and two. It sets forth the payment to PMA by the individual employers of the plaintiff, according to the collective bargaining agreement, including all fringe benefits (deferred contingent compensation), but that the funds are paid to the PMA are not entirely used for the plaintiffs, and that PMA has only paid and disbursed portions to the plaintiffs or for their use. The plaintiffs seek to impress the trust upon such of the funds as are in hands of such defendants, and that a demand has been made upon the various defendants for an accounting, and the defendants have and do now refuse and neglect and fail to account for the funds or any part thereof, or use the same according to the collective bargaining agreement for the purposes for which it was paid, or to the plaintiffs.

It is alleged in the third count (R-44) that within four years last past, each plaintiff has suffered damages by breach of the contract in the sum of $5,000 per year, which is the difference in each one's earnings, had each been dispatched and paid under the contract, and they pray leave

to amend their complaint and set forth the exact sums when they are ascertained upon discovery.

The fourth cause of action (R-44) re-alleges the first two counts and sets forth that the use of "registration" of employees is novel to the maritime industry and used originally to designate employees in the industry of full-time employees dependent thereon for their livelihood as distinguished from those who are seasonal or parttime or dependent upon other employment during other parts of the year for their livelihood, and this is the provision of the current written agreement. It alleges under the prior contract preference of dispatch and registration were given to those with union membership by express provisions in that writing. On April 6, 1961, an Examiner in proceedings before the NLRB made an interim report holding that the execution of the written collective bargaining agreement was in and of itself an unfair labor practice because of the union membership preference. As a result thereof, the defendant PMA and the defendant ILWU re-negotiated the basic contract providing for the priority of employment and dispatch to those "registered" as of June 1, 1951 under the illegal provisions for prior registration, in order to defeat and avoid this determination of the NLRB. On February 26, 1952, the NLRB on the basis of the interim report directly determined the execution of the written contracts granting preference of registration and dispatch to union members was per se an unlawful labor practice. Thereupon the defendant ILWU and PMA, to defeat and make void the determination of the NLRB, re-negotiated the clerk's collective bargaining agreement on April 4, 1952 and executed the Master Agreement providing for said seniority date of June 1, 1951. That thereafter, in June of 1954, the NLRB

proceedings were reviewed by the U. S. Court of Appeals, Ninth Circuit, and in 211 Fed 2d 946, the provisions as to priority of registration and dispatch to union members was adjudicated illegal and void. And that for the purpose of frustrating and avoiding the 2 NLRB orders, and the U.S. Court of Appeals decision, the Master Agreement contain both the seniority dates of June 1, 1951 and the registration provisions requiring "joint consent" (arbitrary veto by the union through its selected and directed employee member) and the denial of all arbitration and grievance machinery to "non-union Non-registered" ship clerks, has not only been continued, but extended and kept in effect, well knowing the said purpose, and it was extended again by a writing dated June 29, 1962.

That although the collective bargaining agreement contains the express provisions against discrimination because of lack of union membership, the defendant PMA and ILWU and the defendant LOCAL 34, the defendant COMMITTEE, and the defendant trustees of the funds do now use the designation of "registration" not only to defeat the NLRB order, and the adjudication by confining "registered" ship clerks in the Port of San Francisco solely to such full-book members of LOCAL 34, and make the two terms of registration and full-book membership synonomous, but also to discriminate against the plaintiffs and all other full-time members (not union members) of the working force of ship clerks, in order to grant a preference to said union members, not only in dispatch and employment, but also to use the earnings in the Welfare and Pension Fund solely for full-book members of the union, and also to permit the defendant PMA to unlawfully divert to itself the vacation pay and parts of the Mechanization Fund, part of the hourly pay under the "Eight-hour Rule" of all non-union ship clerks in the Port of San Francisco in violation of the collective bargaining

agreement, and that to effect this unlawful design in contract violations, the defendants by their acts and conspiracy have done the following acts:

1. Maintained on the "registered" list of defendant Committee all union members "registered" under the prior illegal contract provisions.

2. Kept the "registered" number of ship clerks in the Port of San Francisco at said artificially low point to grant said preference of employment and dispatch and confine benefits under said jointly trusteed fund to said union members.

3. Breached the written contract provisions as to said Welfare and Pension provisions from 1958 to 1962 when said defendant PMA and defendant ILWU purported to amend the agreement retroactively to June 1, 1961, to confine all benefits to solely said union members by limiting it to "registered" ship clerks.

4. To admit to "registration", ship clerks in said Port, only those who are full-book members of the defendant LOCAL 34, ILWU, and said defendant UNION by its said employee members of the defendant COMMITTEE, limits its consent and vetoed all other such "registration" and do not follow the priority of registration or register an adequate number of ship clerks in violation of said agreement.

5. That the defendant LOCAL 34 collected compensation monthly as a "permit" to work under said collective bargaining agreement from all non-union ship clerks, both for itself and the defendant ILWU, including monthly charges itemized for "representation and caucuses" in connection with said collective bargaining agreement which said monthly permit charges were identical in amount with the dues and assessments of its full-book members.

6. Confined votes in election of said employee member of the

defendant Committee solely to the said full-book membership, including said supervisory employees and retired union members not dispatched from day to day from said hall and excludes plaintiff and all other full-time members of the ship clerk working force in the Port who are not acceptable to the union membership, from such vote.

7. Confine election of hiring hall dispatchers who actually give out jobs, to vote and election by such full-book union members, including supervisory employees and retired union members, who are not dispatched from day to day from said hiring hall, and exclude the plaintiffs and all other members of the ship clerks' full-time working force not admitted into full-book membership from such vote.

8. Exclude from all mechanics of grievance and from arbitration under the said collective bargaining agreement, all non-union non-registered ship clerks, including the plaintiffs, and when plaintiffs seek the judicial determination, discriminate even further against the plaintiffs therefore.

9. Dispatch to all jobs in preference full-book union members, who choose to work and give priority not only to dispatch but employment of said union members, including jobs with higher pay, overtime, or penalty pay.

10. Permit and assist the defendant PMA to discriminate against the non-union ship clerks, not only in such employment, but in paying non-union ship clerks and to permit PMA to profit by said discrimination:

a. Although the plaintiffs and other non-union ship clerks, members of the permanent working force do the same work under the same contract provisions, it pays plaintiff and the other non-union clerks

for actual hours, and not under the Eight-hour Rule, and no fringe benefits, though the money therefor is paid PMA by the individual employers according to the terms of the collective bargaining agreement.

b. It pays the union members according to the provisions of the agreement.

c. Non-union members, when dispatched (without said current discrimination against the plaintiffs for seeking judicial remedy) earn between $4,000 to $5,000 per year, working ordinary business days during ordinary business hours (not overtime or evenings where there is additional or higher pay) and receive no part of the vacation, welfare and pension benefits or Mechanization Fund payments. On the other hand, union members receive about $5,000 per year more, plus two weeks at straight pay, or more, as vacation pay, plus all the Welfare and Pension benefits, and some unknown 410 of the industry receive from PMA payments for the Mechanization Fund benefits, though some 1,390 more are entitled thereto, and said union members will as beneficiaries receive such of said multi-million dollar fund, as may be disbursed, unless judicial remedy therefore intervenes.

The amended complaint (R-48-50) sets forth the contraversy and how this use of registration is made coextensive with full-book union membership in LOCAL 34, and how the union collects by its monthly "permit" charges, including representation and caucuses, (the same sums monthly as it collects from its full-book members for dues and assessments); that this is used as a means to discriminate against the plaintiffs and 48% of the full-time working force dispatched from the hiring halls, and to pay them less, although PMA does collect the full contract compensation

on each employee's work, but profits by joining in this procedure to the extent it keeps the plaintiff's compensation, and the other non-union full-time members of the working force.

The defendant PMA noticed a motion. (R-56) seeking to dismiss the complaint, asking for a Summary Judgment in the form of a stay proceedings though it is specific performance of the alleged contract to arbitrate The defendant unions, defendant employee members of the COMMITTEE, and of the trusts, adopted this motion.

In support of PMA's and the employer members' Motion for Summary Judgment, PMA filed an affidavit of J. A. ROBERTSON (R-71). This affidavit for ROBERTSON states that he is secretary of the PMA, and that ILWU is the duly recognized exclusive collective bargaining representative of ship clerks. The affidavit sets forth that the ILWU-PMA collective bargaining agreement in effect prior to June 1962 contained a written agreement, in which portions were set forth hoc verba, including grievance and arbitration provisions constituting four pages of quotations of this alleged agreement, and it sets forth in substance alleged rules covering registration and re-registration of clerks in San Francisco.

The ROBERTSON affidavit (R-75) states that virtually identical complaint involving 35 other non-registered clerks similar to the plaintiffs, in ANDREWS vs. PMA, Superior Court, San Francisco, was filed on March 26, 1962, and the plaintiffs were represented by the same counsel, and that the Honorable Joseph J. Karesh stayed further proceedings in the ANDREWS case, and attaches a copy of the Order of the Superior Court dated March 28, 1963, and states that the plaintiffs never presented their

claims in the grievance and arbitration machinery provided under the collective bargaining contract. Attached to the affidavit as an exhibit is a copy of the order in the Superior Court action, stating a Motion for a Summary Judgment was made and that the Court having considered the argument of counsel and the memorandum and affidavit submitted in support and opposition to the Motion "and Richard Ernst as counsel for the employer defendants and George R. Andersen as counsel for the union defendants, having orally represented to the Court at the hearing that the collective bargaining contract contains a detailed grievance procedure including arbitration before Professor Kagel of the University of California," and that the issues presented by the complaint can be made a grievance and taken by the plaintiffs through the grievance procedure to arbitration, and the Court's attention having heretofore been directed to the records of a companion case filed in the United States District Court for the Northern District of California styled FRED A. ALEXANDER, et al., vs. PACIFIC MARITIME ASSOCIATION, et al., No. 40935, and the recent decision of the United States Court of Appeals for the Ninth Circuit in said action No. 18324 in the Court of Appeals, and based on the record and pleadings herein and the representations of counsel.

> "The court finds that there is in fact a collective bargaining agreement herein which does in fact contain a grievance procedure including ultimate arbitration before PROFESSOR KAGEL."

It should be observed that under California procedure, an order to arbitrate, is not an appealable order as it is under the Federal law and decisions. It should also be noted that although repeated requests have been made to have a determination by the arbitrator of his jurisdiction from

March 1963, for the entire balance of that calendar year, through opposition of both Ernst and Andersen, and delay by PROFESSOR KAGEL, no hearing has been had during that entire calendar year, and it was not until December, 1963, that KAGEL would even meet with counsel to discuss the procedure for hearing the issues on jurisdiction.

To this affidavit of ROBERTSON for Summary Judgment, were filed two affidavits in resistance. One was by RAY MARVIN (R-115). MARVIN'S affidavit sets forth that the collective bargaining agreement in the above entitled action is set forth in para. 5 of the amended complaint, pages 2 and 3, and consists of eleven writings and quotes the provision as to modification; that any amendment, modification, change, alteration or waive of any provision must be in writing, and that this provision has never been modified or changed. It sets forth that the alleged provision set forth in the ROBERTSON affidavit is no part of the collective bargaining agreement, but is Section 17 of the Longshore Agreement of May 1962, a separate and distinct agreement covering solely Longshoremen and not ship clerks whose collective bargaining agreement is separate and dis tinct therefrom, and that the plaintiff is entitled to a jury trial on the factual issues as to the contract and its contents, and that the ship clerk's bargaining agreement contains no provision as to the grievance or arbitration.

MARVIN'S affidavit sets forth (R-117) that the affiant on June 26, 1962 through his counsel, Mr. Crittenden, demanded in writing of the defendant ILWU, LOCAL 34, PMA, JOINT PORT CLERK LABOR RELATIONS COMMITTEE, and the defendant trustees, that if there were any mechanics or provisions as to arbitration, that he would welcome such mechanics of arbitration to solve the dispute or any phase of them. That

the defendants and each of them refused to reply to said written communication, and plaintiffs filed their action on August 13, 1962, six weeks after said communication. The affidavit sets forth that the defendants cannot refuse to arbitrate, and then ask a stay of this action required by the refusal to arbitrate. The affidavit sets forth that this action has been pending since August 13, 1962, and that no request was made to arbitrate until the Motion was noticed in May of 1963, some nine months thereafter, and if there were not already a waiver, such would be and is a waiver of any provisions for arbitration, if in fact there were any provisions of arbitration.

In opposition to the showing for Summary Judgment CRITTENDEN as attorney for the plaintiffs, filed his affidavit (R-103). He states that the collective bargaining agreement covering the ship clerks in the Port of San Francisco is the written contract set forth in the amended complaint, page 2, to wit, and lists the eleven documents starting with the Master Agreement, for April 19, 1962. The affidavitquotes the provision that the agreement cannot be amended, modified, changed, altered or waived except in writing executed by the parties, and that this provision is still in full force and effect.

MR. CRITTENDEN'S affidavit (R-104) sets forth that portions of the Section 17 set forth by the ROBERTSON affidavit are extracted from the Longshore Agreement of May 9, 1962, which by its terms applies solely to Longshoremen, and not to ship clerks, who have a separate written collective bargaining agreement. That other portions (numbered 1 and 2) appear to be part of the language of the Ship Clerk's Master Agree-

ment. It states that the quotation in ROBERTSON'S affidavit, page 5, lines 9 to 26, appears to be taken from the proceedings of the defendant Committee in 1954, that states it is not to change said Master Agreement.

Mr. Crittenden's affidavit (R-105) states that in the Fall of 1961, affiant as attorney for ROY BLISS, a ship clerk employed in the Port of San Francisco, made a demand in writing under the Landrum-Griffin Act, Section 104, to inspect the collective bargaining agreement and pursuant thereto the said BLISS inspected the said writings and looked for applicable provisions as to grievance and/or arbitration, and found none applicable to "non-registered" non-union ship clerks. The said BLISS brought the list of the writings, and this list consisted of the Master Clerk's Agreement of April 1952, and subsequent written changes substantially as listed in the amended complaint, with a few omissions therefrom. That affiant called at ERNST'S office and was shown a copy of ERNST'S letter to his clients listing the writings of the Clerk's Contract, and that ERNST'S office provided affiant with copies of the agreements that affiant did not have in his files. That affiant set forth these writings in the complaint, omitting only the portions which were regulations or proceedings of the Clerk's JOINT PORT LABOR RELATIONS COMMITTEE, as the Committee is created by the agreement, and not authorized or empowered to change, alter or amend the collective bargaining agreement.

MR. CRITTENDEN'S affidavit (R-107) states that affiant as attorney for these nine plaintiffs in this action wrote the defendants and sent copies to both Mr. Ernst and Mr. Andersen, and among other things stated:

"As in that prior action, I have examined the Joint Agreement, and can find no provision for arbitration machinery for disputes involving either matters for registration or dispatch. If you know of any such mechanics or terms in the collective bargaining agreement as to arbitration covering these matters, I would welcome the mechanics of arbitration to solve these disputes or any phase of them on behalf of my client."

The affidavit of Mr Crittenden states (R-107) that none of these defendants, or either of the counsel, responded orally or in writing to the demands, and as a result thereof, affiant as counsel for said clients on August 13, 1962 filed the above action. The affidavit states that defendants having refused to arbitrate and having subsequently required the plaintiffs to resort to the judicial remedy, cannot now be heard to ask to stay the proceedings required to be commenced for their failure to respond or arbitrate.

The affidavit (R-105) attaches and incorporates pages 20-23 of the Clerk's Master Agreement of April 4, 1952 as to arbitration, and no part thereof is applicable to any of these actions, and that the defendants may not make grievance procedure to be submitted to the defendants themselves, or require the plaintiffs to submit their cause to interested party defendants for determination or control. The affidavit (R-105) states that adversaries are not competent to pass upon their own wrongs and their own breaches of contract, nor to conduct the plaintiff's cause of action.

Mr. Crittenden's affidavit (R-105) states that in August, 1962, there arose a grievance involving an employer AMERICAN PRESIDENT LINES against a certain ROPER, a Ship Clerk and client of the affiant in another action. The defendant LOCAL 34 as exclusive bargaining agent undertook

to represent the said ROPER as a "non-registered" clerk in said matter, and in line with their planned and hostile action against all such ship clerks not holding full membership in said Local, proceeded to conspire with the employer member and permanently to bar the said ROPER from all employment as a ship clerk, although the said ROPER had years of experience, had a good clear record, and although the collective bargaining agreement did not authorize said "punishment." That affiant as attorney for ROPER immediately requested arbitration pursuant to the Master Agreement and sent letters therefor in connection with said attempted appeal to the defendant JOINT PORT COMMITTEE, to the UNION, to ERNST and ANDERSEN as counsel, and to SAM KAGEL as Area Arbitrator. That the said KAGEL as said Area Arbitrator stated in writing that the said ROPER a "non-registered" non-union clerk had no remedy of arbitration under the collective bargaining agreement, and refused ROPER said arbitration.

CRITTENDEN'S affidavit (R-105) states that in his telephone conference with Ernst involving the Roper matter during November, 1962, the said Ernst advised the affiant that provisions as to grievance and arbitration quoted to affiant in a prior letter (and similar to that, set forth in the Robertson affidavit) was orally agreed upon in substance, and that the matter had not yet been reduced to a writing, nor had the exact language thereof been agreed to by PMA and the UNION as bargaining agent.

CRITTENDEN'S affidavit (R-109) sets forth that any attempt to arbitrate is a useless act for the reason that the written collective bargaining agreement does not provide for arbitration nor for grievances of

differences involving the defendant PORT COMMITTEE in registration or dispatch of the plaintiffs, and in other matters the said defendants and KAGEL as arbitrator have refused to hear and determine such matters involving "non-registered" non-union Ship Clerks.

United States District Judge Harris considered the deposition of J. PAUL ST. SURE. This is a part of the record, as an exhibit. ST. SURE testified during the deposition, page 4 thereof, that there was an oral agreement to "codify" the Clerk's Contract, but it was not yet in writing and signed (See Appendix)

On page 6, MR. ST. SURE identified the Pacific Coast Longshore Agreement dated June 1, 1961, stated it was signed May 8, 1962, almost a year after it was dated. He testified (page 7-8) that this Longshore Agreement was in effect from June 16, 1961 to the time of its execution on May 9, 1962, even though it was not reduced to writing.

On page 8 & 9, he testified that the 30-page Master Agreement was part in effect and part was not.

Section 27 of the Master Agreement headed "Modification" states that the agreement could only be amended, modified, changed or waived by another writing was read to MR. ST. SURE, and asked if it were in effect. On the bottom of page 9, he testified that he was not sure. On page 11, he testified that a similar provision was in the Longshore Agreement under Section 22.

As in discovery proceedings, counsel for the plaintiff took all documents tendered and marked them for identification, even though it was obvious they were not applicable to Ship Clerks, or clearly not parts of the agreement.

ST. SURE testified, pages 24-25, that he was not in a position to identify all of the documents, and that the total contract included the Minutes of the Coast Committee, the Area Labor Relations Committee, the Arbitrator's Award, and that they were constantly subject to modification by day-to-day understandings, evidently the oral hip-pocket type intended to be outlawed by Section 27. Indeed, the testimony of ST. SURE was that the Employers can and do delegate through the staff of PMA, various negotiations and changes of the contracts, as for instance the Coast Labor Relations Committee, by jointly signing Minutes, interpreting, clarifying, modifying or amending the basic agreement (page 25). The testimony was even stronger that there were not only the writings, but also oral understandings in the process of being reduced to writing, and certain Minutes of two committees, but also the Port, Coast and Area Committee, who exercise the same powers. At page 27, he testified that the agreement was not a piece of paper or a document, it can be an idea that can be reduced to writing, but it also can be a general idea the parties want to do something about, but haven't agreed to the terms, and it seems to be any general idea that ILWU and PMA have for a particular rule or situation. He testified that although the parties prefer to reduce it to writing, they do not always do so, and it may be done by telephone or teletype.

The PMA-ILWU Agreement of August 25, 1960, Exhibit 18, by its very terms, undertakes to modify and interpret the existing Longshore and existing Clerk's Master Agreement by providing for registration by a 5% Rule, that if 5% of work is done by non-registered employees in a particular

port, that new registration shall be made in that particular area or port.

ST. SURE testified, page 31, that $1,500,000 consideration for the execution of the August 10, 1959 document, was paid into the Mechanization and Modernization Fund. On page 32, he testified that this was collected on a man-hour assessment basis, of all employed under the bargaining agreement, and if any of the plaintiffs were so employed at that time, it was collected on their hours of work. The witness testified on page 34-5 that the subsequent $5,000,000 per year collected during the following two years, were on a combination of tonnage and man hours, and that the man hour assessment included the labor of such of the plaintiffs as were employed during those calendar years in the Port of San Francisco.

Exhibits 44, 45 and 46 (see page 123) are reports to the Federal government by the various funds who are defendants in this suit. The report to the Federal government of the Mechanization Fund designated as "wage stabilization" showed by the report of December 3, 1962, that as of the middle of the year, only $3,149,703 had been paid or held by the Fund (page 75), and the "Longshore Vesting Benefit Fund" was an unfunded fund (page 76), which states (page 78) that only 410 were apparently receiving benefits, plus an additional 1,309 were eligible but not receiving benefits. The testimony of the witness showed that many millions of dollars were collected, and paid into the Trust Fund, but the reports by the Funds to the Federal Government, required by Acts of Congress, showed a substantially smaller sum reported.

The question on page 61 was directed to when the Pacific Coast Longshore Agreement superceded the Coast Master Agreement for Clerks

and Checkers, referred to in Section 9.11 of Exhibit 39 dated February 28, 1962. On page 62, MR. ST. SURE testified that over the past ten years, they have been negotiating for a single agreement which would cover the various classifications of work, whether Clerk, Longshoreman, Carloader, Dock Worker, or whatever. Each of these classifications had their separate agreement on a separate document, and they have all been merged in a single negotiation into a single contract, and then the witness testified:

> "The mechanical job of getting them together in one volume is still in process, but there has been the record and fact over the past at least ten years to my knowledge."

The agreement dated June 22, 1962, Exhibit 21, marked for identification at page 21, under para. XXXI entitled "Term of Agreement" states that it amends Section 20.2 of the Coast Longshore Agreement and the appropriate section of the Clerk's Master Agreement. ST. SURE recognized the Master Agreement was in existence (See quotation from page 162 of deposition in appendix).

It is interesting to note that the testimony of MR. ST. SURE, page 68-9 states that awards of arbitrators are not determinative of the matter, even though made so by the written collective bargaining agreement, but it is part of the bargaining process, and even awards of arbitration are modified, changed, and altered by mutual agreement of the PMA and UNION by subsequent bargaining.

We can safely summarize ST. SURE'S testimony that as late as June 22, 1962, there was in contemplation of the parties, and according to the supplement of that date, both a separate Coast Longshore Agreement

applying to Longshoremen only, and a Master Agreement for Clerks and Checkers, applicable to Ship Clerks only. There has been some type of an oral understanding, but the draft of the agreement has not been agreed upon. It has merely been drawn by PMA and sent to the UNION for their consideration. As to arbitration proceedings, there is none applicable to these plaintiffs or this action as of the date of the filing and commencing of this action.

Upon this state of the record, the District Court made its order of July 19, 1963 without any opportunity for trial of any disputed issues of fact. It is clearly an appealable order under Goodall-Stanford, Inc. vs. United Terminal Workers, 353 U.S. 550, 11 L Ed 2d 1031, 77 S Ct 920.

SPECIFICATION OF ERROR

1. There being an issue of fact as the existence of a written contract, and whether this contract had contractual provisions for arbitration applicable to the dispute at issue, the plaintiffs were entitled to a trial of these issues before any Judgment or Order is made requiring arbitration or stay of proceedings pending the matter on arbitration.

2. There is an issue of fact raised by the affidavits that there was a waiver of arbitration (if there were any provisions in the contract requiring arbitration ) by both:

a. The passage of time between the bringing of the action in August 1962 and the defendant's Motion of May 20, 1963 for Summary Judgment, etc.

b. Plaintiffs through their counsel on June 26, 1962 requested of the defendants for arbitration of any matter in dispute, if there were any

provisions in the bargaining agreement therefor, (plaintiffs' counsel stated he could find none). Defendants refused and neglected to arbitrate or respond to this request, and required the plaintiffs to bring this action, which they did on August 13, 1962. Having by neglect and refusal to arbitrate, and thereby requiring the plaintiffs to commence this action, they cannot now contend that the action, their refusal and neglect necessitated, should be stayed. These issues of fact must be tried and cannot be resolved on affidavit. A jury trial was requested, both in the plaintiff's MARVIN'S affidavit (R-115 at 117) and in the plaintiffs' Points and Authorities (R-89 at 94).

3. Both the defendant UNION upon a demand under the Landrum-Griffin Act, having disclosed a contract showing there is no proceedings for arbitration, and defendant's counsel having represented to the plaintiffs and their counsel that the Master Agreement for Clerks and Checkers dated 1952, with amendments, which specifically excluded any arbitration as to the plaintiff, defendants are estopped, when the plaintiff commenced the action for breach of this contract, to contend there is another or different contract, or one having substantially different terms, including an arbitration of disputes provisions, which is not contained in the disclosed contract. This factual issue of estoppel is properly triable and not to be determined on conflicting affidavits for Summary Judgment.

4. Where there is an issue of fact as to the existence of provisions of a written contract to arbitrate, or the failure or neglect to perform such a contract or of waiver or estoppel, these issues must be tried and not resolved on conflicting affidavits.

5. The court did not make findings of fact required for its Final

Judgment, or an order which has the effect of a Final Judgment.

6. The District Court erred in refusing to enforce JUDGE SWEIGERT'S Order of May 10, 1962, overruling the objections to the interrogatories, and ordering the defendants to answer. The next step in the proceedings is one to impose sanctions when the defendant refuses to obey the order.

7. A judgment requiring arbitration is specific performance of a contract to arbitrate. The Court did not in this order appealed from specify what were the acts to arbitrate on arbitratable issues. Where there is no provision for arbitration in the written contract, shown by the plaintiffs' affidavits on the Summary Judgment Motion, it is impossible for the plaintiffs to arbitrate, as the defendants at each stage contend there is some other or different contract provisions, not in writing, making such an order on appeal meaningless, except to deny the plaintiffs all possible remedy without an opportunity for their day in Court to prove their cause of action and enforce their rights under the contract that the defendants breached. A decree of specific performance must set forth with certainty the acts which the parties are to perform under the written contract.

I. WHERE THERE IS AN ISSUE AS TO THE ALLEGED CONTRACT TO ARBITRATE A DISPUTE, OR THE DEFENSE OF WAIVER, OR ESTOPPEL IS PLEADED, THERE MUST BE A TRIAL OF ISSUES BEFORE THE COURT, AND IF A JURY TRIAL IS DEMANDED, THEN BEFORE A JURY.

In the case at bar, there were issues framed as to the existence of a written contract requiring arbitration. ROBERTSON'S affidavit (R-71)

claimed such a contract, although the testimony of the defendant's president ST. SURE was to the contrary. The defendants' affidavits, MARVIN'S affidavit (R-115) and Crittenden's affidavit (R-103) both denied the existence of any contract to arbitrate.

Affidavits of the plaintiff MARVIN (R-115) and plaintiffs' counsel CRITTE. .EN (R-103) shows a timely demand for arbitration procedure, and a statement that plaintiffs' counsel could find none. Evidently, all of the defendants and their counsel, at that time believed no arbitration procedure was open to the plaintiffs, for indeed another Ship Clerk, not a plaintiff in this case, ROPER, had attempted to have arbitration for a grievance filed against him by a steamship line, and arbitration was refused because he was a non-union non-registered Ship Clerk, as were the plaintiffs in this case. Six weeks passed without so much as a reply, and the plaintiffs thereupon filed their suit. Nine months after the suit was filed, the first steps toward arbitration were commenced by this motion of the defendant PMA and the Employer defendants notice for May 20, 1963, asking for the Summary Judgment, etc., which resulted in the order appealed from.

The affidavit of MARVIN (R-117) asked for a jury trial. Plaintiffs' counsel in the Points and Authorities on Resistance to the Motion for Summary Judgment, R-93, points out that factual issues as to the existence of a contract to arbitrate is a matter of fact to be tried before a jury, and its issue appears in the affidavits.

A summary judgment to arbitrate should not be issued where there are contraverted issues of fact in conflicting affidavits.

Proctor & Gamble Independent Union vs. Proctor & Gamble Mfg. Co. 2 Cir 1962 312 Fed 2d 181.

The Proctor & Gamble Case (312 Fed 2d 181) involved a similar order as the case at bar, requiring an arbitration under a collective bargaining agreement. In that case, there was an issue as to whether the contract was in effect on the specific dates the facts of the dispute arose. The Second Circuit held that there should not be such a direction to arbitrate on conflicting affidavits and cites Fountain vs. Filson, 336 U.S. 61, 69 S Ct 574, and Preppo Corp. vs. Pressure Can Corp., 7 Cir 234 Fed 2d 700, Cert Den 352 U.S. 892. The Court points out that the duty to arbitrate is wholly contractural, and the right to arbitrate is not an incident of the employer-employee relationship, but is one based on express written contract.

The Proctor & Gamble Case (312 Fed 2d 181) is also strikingly similar in another matter, in that the Master Agreement in this case, as was the collective bargaining agreement in that case, drawn with the view of the Union on one side and the Employer's Association PMA on the other, and the grievance clause was so worded, and it does not grant the right to an individual employee any right to arbitrate. The particular agreement in this case, the Master Agreement of 1952, specifically excludes these plaintiffs by its express terms from any grievance machinery, except to go to the very defendant COMMITTEE breaching the contract to ask it to pass on its own wrong, and to condemn itself. The contract specifically excludes dispatch disputes, hiring hall operation, pay, and any other matter from the Coast Committee or the Coast Arbitrator, except for registered

non-union Ship Clerks, of which the plaintiffs are not one, and there just are none in this Port, and no arbitration is then permitted any individual.

The present case is governed by the law applicable to labor contracts and the cases applicable to arbitration under the Federal Arbitration Act, though not binding, are guiding analogy.

Engineers Assn. vs. Sperry Gyroscope Co., 2 Cir 1957, 251 Fed 2d 133.

This distinction is clearly drawn in Goodall-Stanford, Inc. vs. U. S. Textile Workers, 353 U. S. 550, 77 S ct 920, where the Supreme Court held that Sec. 301 suits are not comparable to a suit under the Arbitration Act, but one brought under Section 301, is a different situation, and arbitration is not a step in the judicial enforcement of the claim, nor ancillary thereto, but is the full relief. The decree under Section 301 requiring arbitration of a labor dispute under a collective bargaining agreement, is a final decision within 28 USCA 1291, and appealable.

For the purpose of this analogy, let us examine the Arbitration Act cases:

L. Haas Engineering & Transportation Co. vs. American Independent Oil Co., 2 Cir 289 Fed 2d 346 Cert Den 368, U.S. 827 involved arbitration under the Federal Arbitration Act, in which it was contended there was a conditional acceptance of the contract, and the Court cannot determine on conflicting affidavits, whether this condition was or was not performed, to determine whether or not the contract for arbitration existed, but this matter must be tried as any other case, by evidence taken before the Court, or if a jury is requested, before a jury.

American Locomotive Co. vs. Gyro Process Co., CCA-Mich. 185 Fed 2d 316, holds that not only must there be under the Arbitration Act no issue as to the making of the contract and also the failure to comply to order arbitration, but there can also be a waiver of the right to arbitration, and the pleading or active participation in a lawsuit without immediately taking the steps for arbitration, is a waiver of the contract provisions as to arbitration.

Lummus vs. Commonwealth Refining Co., DC-NY 1961, 195 Fed Supp 572, involved a diversity suit applying the law of New York. It involved the issues as to whether there was a valid contract requiring an arbitration. There were numerous proceedings involving injunctions pendente lite against suits brought in Porto Rico and in the New York Courts, and it was pointed out that this was a preliminary injunction staying arbitration until the validity of the contract upon which arbitration was requested could be determined. The Lummus Case directed that the issues be tried before a Court, or if a jury be demanded, by a jury, to determine if there were a valid contract requiring arbitration, and if there were arbitrable issues.

In the case at bar, there was an issue as to whether there was a contract, and if it were in writing, if the writing required arbitration. It also raises the issue of estoppel to contend there is any other contract than the Master Agreement with the supplements pleaded in the complaint. The issues present waiver.

## II. THE RIGHT TO ARBITRATE IS BASED UPON CONTRACT, AND THIS RIGHT IS NOT SELF EXECUTING, BUT CAN BE WAIVED.

Arbitration is a matter of contract, and the party cannot be required to submit to arbitration in a dispute he has not so agreed to submit

to arbitration.

United Steel Workers vs. Warrior & Gulf Nav. Co. (1960) 363 U.S. 574, 80 S Ct 1347.

Drake Bakeries Ltd. vs. American Bakeries, etc., 370 U. S. 254, 8 L Ed 2d 474, 82 S Ct 1346.

Atkinson vs. Sinclair Refining Co., 370 U.S. 238, 82 S Ct 1318.

The Drake Bakeries Case, 370 U.S. 254, directly holds that arbitration can be ordered, and a judicial proceeding stayed, only when the written collective bargaining agreement requires the controversy to be arbitrated, and the right to arbitration is not waived. In footnote 17 of the Drake's Bakery Case, the Supreme Court cites Lane Ltd. vs. Larns Bros., 2 Cir 1958, 243 Fed 2d 364 in the discussion of waiver.

The Lane Case (243 Fed 2d 364) specifically held that where a party asks arbitration, the other party is forced to abandon the demand and seek judicial relief, the defendant cannot defeat the judicial action by asking arbitration after the suit was commenced.

The Lane Case (243 Fed 2d 364) cites Radiator Specialty Co. vs. Cannon Mills, 4 Cir 1938, 97 Fed 2d 318, holding a delay of nine months (the time involved in the case at bar is August 1962 to May 1963, also nine months) after suit was filed before seeking the remedy of arbitration because of a contractual arbitration clause in the contract is a waiver of the right in the contract to arbitrate.

In the case at bar, we have a demand addressed in writing, shown in both affidavits for the plaintiff (R-115 and 103), and the refusal of each of these defendants and their counsel to communicate or to take any steps in

connection with any arbitration, or even to reply to plaintiffs' counsel's letter stating he would welcome any such mechanics, if there were any in the contracts, but that he could find none. A month and one-half later, the plaintiffs were required to file suit. If there were any applicable provisions in the collective bargaining agreement, this is certainly a waiver, and the defendants cannot now ask to stay a judicial proceeding which they required to be brought by their neglect and wrongful act.

Even after the suit was filed on August 13, 1962, no steps were taken suggesting any arbitration provisions until May of 1963, full nine months thereafter. In the meantime, there were pleadings, motions, and conduct of litigation. It makes no difference as to the merits of any grievance or matters in dispute, if the contract provides for arbitration, it must be resorted to forthwith.

United Steel Workers vs. American Mfg. Co., 363 U.S. 564, 80 S ct 1343.

If we apply the Federal Arbitration Act by analogy, to Section 301 actions, we find that the contract to arbitrate must be in writing.

Federal Arbitration Statute, 9 USCA 2.

Under California law, an agreement to submit an existing or a future controversy to arbitration must be in writing.

CCP 1281.

In the case at bar, the Master Agreement for Clerks, etc., together with the subsequent writings, are pleaded in the amended complaint (R-21-3), and that this collective bargaining agreement specifically denies all matters of arbitration and mechanics for handling grievances

in connection with registration or dispatch, and all other matters are denied and prevented the plaintiffs and each of them who are not "registered" as Ship Clerks by the said defendant Committee (R-36). See also sub-par . 8 (R-47).

The collective bargaining agreement, Ex. 2, in ST. SURE deposition, specifically provides in Section 27, that it can only be changed, modified, altered, or any provision waived, by a subsequent agreement signed by both parties. The writing can therefore only be changed by another writing.

The Taft-Hartley Act contemplates that the contract will be reduced to writing, and executed as the final step in the collective bargaining process, as it makes it an unfair labor practice to refuse to do so. This provision 27 in the Master Agreement requiring all changes to be in writing, is a sufficient demand to require any change to be reduced to writing and executed.

Furthermore, the parol evidence rule prohibits any contract from being changed, modified, altered, or added to by parol evidence, except by an oral agreement fully executed on both sides, and if there is anything to be done, as for example paying an employee, the oral agreement is not fully executed on both sides.

The Landrum-Griffin Act, Section 104, 29 USCA 414, is a wholesome and necessary law permitting an employee to determine the terms of the collective bargaining agreement by inspection of the written document. This Act of Congress would be wholly defeated and meaningless, if it were proper to show an employee under this Act a written contract, and then to permit the Union or the Employer or both to contend that this is not the contract,

and that it is wholly changed and altered by parol, secret agreements, and waivers from the Unions and Employers' breaches of this contract. This Section 104 was enacted by Congress to correct a viscious practice of the Union and the Employer having secret agreements, very disadvantageous to the working man. When differences arose, the working man was faced with these secret agreements. The purpose of Congress was to permit the employee to learn the full terms of the collective bargaining agreement, under which he was employed. To permit secret oral understandings or modifications as contended by the defendants and shown in the ST. SURE deposition, is to make the Act of Congress meaningless, and to defeat its very purpose.

There is also an estoppel against the defendants contending the contract is other than that disclosed by the writings. Inquiry was made both under the Landrum-Griffin Act, Section 104, and through plaintiffs' counsel. Defendants are not now in a position to contend the written contracts they disclosed, and the plaintiffs acted upon is different, and that there is some other and different, oral, secret agreement. When any plaintiff accepts dispatch, the terms of the collective bargaining agreement is incorporated and implied into the master-servant relationship. It is the known and disclosed written contract that is part of this employment, and the defendant UNION and the defendant PMA are estopped to contend it is different, or that the contract is not as it was acted upon, particularly the disclosed terms of compensation, including deferred contingent compensation (fringe benefits), for both the individual employer and the plaintiffs believed this applied, and PMA was paid by the individual employers

upon this disclosed contract. The difficulty arises that PMA has not paid out the monies it received from the individual employers of the plaintiffs, but has fattened its pocket by retaining the difference.

Some of the monies were paid by PMA for the Health and Welfare Fund to the defendant trustees of that fund, but these defendant trustees use it solely for the full-book members of defendant LOCAL 34, and not for all employees in contravention of the express terms of the contract, until late February, 1962, when the contract was amended retroactively to June, 1961. The last document pleaded by the plaintiffs as part of the collective bargaining agreement, the Memorandum of February 22, 1962, approximately a month and one-half before this suit was commenced, leaves no doubt that this Master Agreement, Exhibit 2, in the deposition, was in full force and effect on that date. Even MR. ST. SURE'S testimony so shows (deposition, page 162). The June 22, 1962 Memorandum of Agreement, is Exhibit 21 (of the ST. SURE deposition) and par. XXXI, on page 21 of that document, states:

> "Amend Section 20.2 of the Coast Longshore Agreement and the appropriate Section of the Clerk's Master Agreement to read as follows:"

Therefore, in contemplation of the parties on June 22, 1962, when this Memorandum was executed, there was in full force and effect the Clerk's Master Agreement.

The defendant PMA and the other defendants, having been caught with their hand in the cookie jar, and realizing that this involves very substantial sums of money unpaid to the plaintiffs and others similarly situated, have undertaken to amend the facts and contend there is a secret oral under-

standing over an indefinite period changing, modifying and creating the collective bargaining agreement and completely obliterating from the agreement the solemn written contracts, including the Master Agreement for Clerks of April 1952, and all subsequent modifications thereof in writing (even as late as June 22, 1962).

Parties are not required to arbitrate matters they have not contracted to submit to arbitration, and when the factual matters in dispute as to what the contract is, has been determined upon by trial, the question as to what disputes are arbitrable, is a question of contract interpretation by the Court.

Drake Bakery, Inc. vs. Local 50, 370 U.S. 254, 82 S Ct 1348.

Atkinson vs. Sinclair Refining Co., 370 U.S. 238, 82 S Ct 1318.

United Steel Workers vs. Warrior & Gulf Nav. Co., 363 U.S. 574, 80 S Ct 1347.

A very interesting case involving a collective bargaining agreement Section 301 suit is Refinery Employees Union vs. Continental Co., 5 Cir 1959, 268 Fed 2d 447, in which the Court stated that it has the duty and authority to determine the arbitrability and its scope under the collective bargaining agreement, and also whether it was the intention, as expressed in the contract, to submit to arbitration determination of remedy for breach of the contract, including authority to award damages for miss-assigning overtime, contrary to the management's policy to pay for only work performed. There appears to have been overtime assigned by the company to employees, in violation of the collective bargaining agreement, which was acknowledged by the company. The Union sought to impose penalty and for

damages, and sought to have this arbitrated without limit as to issues. The Refinery Employees' Union Case, 268 Fed 2d 447 held that the Court was committed to broad liberalities on arbitration issues in Labor Management matters, but this policy does not permit the Court to find an agreement where there is none. As in the case at bar, it authorized arbitration of differences relating to the interpretation of the contract; however, the Refinery Case involved a contract that extended to arbitration of matters of performance, but the contract was silent as to remedy for miss-assigned overtime or breach of the contract, and the real dispute was whether the company must pay for time not worked. The decision directly holds that there is no intention to clothe the arbitrator with power to fix value or damages, and this cannot be conferred upon an arbitrator, unless the power is in the contract. It cites the following cases:

United Electric etc. Workers vs. Miller Metal Products, 4 Cir, 215 Fed 2d 211;

International Union vs. Colonial Hardwood Floor Co., 4 Cir, 168 Fed 2d 33;

Council of Western Elec. etc. Employees vs. Western Electric, 2 Cir 238 Fed 2d 892;

Local 149 vs. General Elec., 1 Cir, 250 Fed 2d 922.

All of these cases were cited for authority that without specific authorization, the arbitrator cannot award damages or impose a monetary penalty.

In the Master Agreement for Clerks, Exhibit 2, in the deposition, at pages 20 to 23, there is a Section 21 headed "Grievance Machinery"

that defines the arbitrator's authority under that contract. Pages 20 to 23 are also attached to CRITTENDEN'S affidavit (R-114). On page 23, sub-paragraph 8, the authority and the jurisdiction of the arbitrators are spelled out (when they have any authority or jurisdiction of any dispute under the contract). It states:

> "Power of arbitrators shall be limited strictly to application and interpretation of the agreement as written."

This precludes the arbitrator from determing what portions of the agreement are illegal.

It then states that subject to the limitations contained in Sec. 21, the Coast Arbitrator shall have jurisdiction to decide any and all disputes arising under the agreement, including cases dealing with resumption or continuation of work. Sec. 7 on page 22 specifically directs that neither the Coast Arbitrator nor the Coast Committee shall have any power concerning the methods of maintaining registered lists, or the operation of hiring halls, or the interpretation of Port working and dispatch rules, or the interpretation or enforcement of the contract provisions relative to continuance of work pending determination of disputes, or discharges, or pay. It should be noted that the case at bar turns upon everything excluded. It should be noted that at the bottom of paragraph 7 there is a provision that nothing in that paragraph shall prevent an individual non-union non-registered clerk claiming discrimination from exercising his option to have it adjudicated by the Coast Committee. This exception does not apply to arbitrators.

Section 21, sub-para. 8 on pg. 23 of that document states that the arbitrator's decision must be based upon the showing of facts under the

specific provisions of the written agreement, and expressly confined thereto.

There is no specific grant of power to impose penalties or to grant damages, or to impose a trust, and there is a specific prohibition against the Coast Arbitrator passing upon any matters of registration, dispatch, operation of a hiring hall, or pay, and other matters enumerated.

As in the Proctor & Gamble Independent Union vs. Proctor & Gamble Mfg. Co., 2 Cir 312 Fed 2d 181, we have in the case at bar a collective bargaining agreement which envisions the usual arbitration dispute between the union on one side, and the employer on the other. The plaintiffs are non-union ship clerks who are the subject of the hostile and planned discrimination of the union, and must in this action join both PMA and the UNION, together with the Committee consisting of a member of each, who conducts the hiring hall and maintains the registration lists, from which so much of the matters involved in this suit flow. The major party guilty of the actual acts in connection with the registration is of course the defendant COMMITTEE who runs the hiring hall, and maintains these registration lists. Relief is only effective as to registration and dispatch when the Committee is a defendant.

The Section 21 provides for the appointment of a Port Committee in each Port, and a Coast Committee. An Area Committee referred to in the deposition exists only under the Longshore Agreement. There are none for the Clerks. Were the Longshore Agreement now the Clerk's Agreement, as urged by the defendants, there would be an Area Committee. Section 21 provides that the Employer and the Union shall each have one vote. Para. 2 provides that the arbitrators shall be paid by the parties, meaning

the Union and the Employer. This is strengthened by sub-par 6 at the bottom of page 21 providing that non-union registered clerks who present a grievance shall pay the Union its costs of participation, adjudication, and any arbitration of his grievance. The non-union registered Ship Clerk does not pay directly showing that arbitration and the provisions as to expenses envision the Union on one side, and the Employers on the other. Sub-par. 3 on page 21 provides how grievances arising on the job shall be processed in the following manner:

When a matter such as we have here, involves the Committee's registration list and dispatch, there is an unusual situation of the only party having contractual power to adjudicate disputes being the guilty party who has violated the contract. This is so foreign to any concept of justice and fair play, and requires such a strained construction of the writing, as to show that it was not intended to apply to any dispute involving the COMMITTEE, consisting of both the defendant Union and the defendant PMA.

Sub-par. 4 of Sec. 21 specifically provides that the Area Arbitrator only hears matters in which the COMMITTEE is unable to act by reason of a failure to agree. In practice, the UNION refuses to vote against its full-book members, and there the matter sits, unless it is referred to arbitration. This does not happen when we have a non-union non-registered Ship Clerk, against whom the UNION has its planned and hostile course of conduct and discrimination.

Sub-par. 5 provides that a failure of either party to participate in any step shall automatically move the matter to the next higher level. Sub-par. 6 provides that an individual non-union registered Clerk as an individual may use the grievance machinery, but that he shall pay the UNION the costs of its participation and any arbitration costs. There are just no

non-union registered Clerks in this Port. It is certainly not applicable to any of the plaintiffs whom the defendant COMMITTEE refuses to register in violation of the contract. The arbitration is only applicable if the defendant COMMITTEE is unable to agree.

Sub-par. 7 of Sec. 21 provides that the decision of an Area Arbitrator claimed to be in conflict with the agreement shall be immediately referred to the Coast Committee, which also consists of the two defendants, the UNION and PMA. One would hardly expect a fair hearing or justice in the hands of one's adversaries. Only in the event both the Union member and the Employer member of the Coast Committee are unable to agree, may the matter go to the Coast Arbitrator. This happens when it involves a full-book member of the UNION where the UNION uniformly takes the position its members can do no wrong. It is then spelled out in Sec. 7 that neither the Coast Committee nor the Coast Arbitrator have any power to review any decisions as to the registration or dispatch or operation of the hiring halls or pay, etc. At the last of Sub-par. 7 and the last of Sub.-par. 6, there is a provision which creates an ambiguity. Sub-par. 6 provides for remedies, evidently at the local level, to be adjudicated as to individual non-union registered clerks. Sub-par. 7 provides that only non-union registered clerks claiming discrimination by the Union because of non-membership in the Union may then take such matter to the Joint Coast Committee, without any reference or power to go to any arbitrator. Here again, such a party is relegated to a hearing before his adversaries and not before an impartial third party, nor even an arbitrator selected by his opponents.

From the foregoing, it can be seen that there is no provision as to

arbitration, and that such provisions as to arbitration, specifically exclude these plaintiffs. By requiring one to submit one's grievances to one's adversaries sitting on the defendant COMMITTEE who conducts the hiring halls, makes registration, and who breached the contract, is no remedy at all.

III. A PARTY IS NOT REQUIRED TO SUBMIT HIS MATTERS FOR DECISION TO HIS ADVERSARIES.

It is a basic concept of fair play that a person have some semblance of justice and some tribunal somewhere to try these disputes. As we have shown, the contract provides for no remedy for these plaintiffs, except to go to the defendant Port COMMITTEE who violated the contract, and ask this COMMITTEE consisting of the defendant UNION representative and the defendant PMA employer representative directed, to admit it erred and had acted with discrimination and in violation of the contract.

A similar situation arose and was urged in Steele vs. Louisville & N. R. Co. (1944) 323 U.S. 192, 65 S Ct 192, where it was urged that the employees had an administrative remedy before a Board, under the Railroad Adjustment Act, consisting of members chosen by both the employer and the union. The Supreme Court held that this was no remedy because of the planned, purposeful discrimination by the Union.

In Edwards vs. Capital Airlines, (Ct of App-DC 1949) 176 Fed 2d 754, Cert. den. 338 U.S. 885, certain pilot plaintiffs brought an action after an adverse ruling before a Board under the airline act, consisting of two employer and two Association (union) members. The Court pointed out that the grievance as to seniority, though nominally against the employer company, was against the other employees, and the company was a mere by-

stander, and the union could have taken a neutral position, but it did not, and took a position adverse to the appellants. The Edwards Case, 176 Fed 2d 756 points out that where there is a conflict of interest, a party does not have to submit his disputes for a decision to his adversaries, and that Congress did not intend to submerge the minority's interests in the grievance machinery it provided, and the employee had a right to have his grievance heard by more than merely the union and the employer, for Congress anticipated and contemplated an effective participation. The Edwards Case, 176 Fed 2d 754, held that although there was normally a presumption of validity to the acts of such a Board provided by Act of Congress, yet it was subject to potential extremely dangerous situations that would affect the rights of the minority non-members, and the Court removed the doctrine of finality. This Case, Edwards vs. Capital Airlines, 176 Fed 2d 754, is particularly applicable here for any grievance machinery which relegates the employees to the hands of their adversaries, and requires the very entity conducting the hiring halls and making the registrations to denounce themselves and their own actions is a very strong showing, and further the Edwards Case would prevent any arbitration being final, where the UNION who took a hostile position against the plaintiffs had any part in the selection of the arbitrator. In the case at bar, Sec. 21, provides for the naming of the arbitrator by the UNION and PMA, both defendants. This is hardly one's idea of a fair arbitration to go before an arbitrator who holds his appointment from the two defendants, and expect an arbitrator to take a lucrative job in his hands, in ruling adverse to those who appoint him.

A case by analogy is that of Elgin J.E.R. Co. vs. Burley (1945)

325 U.S. 711, 65 S Ct 1296, where a union as collective bargaining agent settled a monetary claim for penalty wages aggregating $65,274.00 involved under the Railroad Adjustment Board. The Court at page 733, points out that a collective bargaining agent has authority to represent an employee in disputes before the Board, but that in any matter involving settlement, the employee has a voice in it, and Congress did not intend to submerge wholly the individual, and the minority interest, and nullify the rights of employees. At page 736 of 325 U.S., the Court held that the Act of Congress gives more than the mere right to be heard by a union and a carrier in two alternate situations, the first is where the union in its action would do more than remotely affect the other employees, or in the alternative situation where the interest of the employee involved, is not a member of the union, or the interests are not opposed to collective interests of a large number of employees represented by the union, or the union is hostile. The Elgin Case holds that the union as the collective bargaining agent can act under the collective bargaining agreement as to future distribution of work, but not as to settlement of matters for penalty wages or things in the past.

## IV. THE INSTANT ACTION INVOLVES A BARGAINING AGREEMENT, ILLEGAL AND VOID AS TO PART.

The registration provisions of the collective bargaining agreement in effect on June 1, 1951, and prior thereto, granted preference of registration to Union membership. For this reason, the contract was determined to be illegal and void for these terms in 90 NLRB 1021 and 98 NLRB 284, and by this Court, in its decision in 211 Fed 2d 946. This seemingly innocent seniority date of 1 June 1951 is blanketed in and carried over into the

present contract, as it grants preference of employment and dispatch to those who were registered under that illegal agreement on June 1, 1951. Not only is the employee sent to the job in preference, if he were so registered on that date, but if there is work for only one employee, the one having that seemingly innocent seniority date must continue on the job, and the others be released. If at a pier, one clerk is required for overtime, it must be that man having that seemingly innocent seniority date. The man with this seemingly innocent seniority date gets the pick of all available over all others when dispatches are made each day.

In addition to this, the Master Agreement, Ex. 2 in the deposition specifically provides that registration can only be made with "mutual consent" of the employee representative and of the employer representative, both of whom act at the direction of their respective principal. Both must act together to register a man. The union then need only withhold its consent, and grant it as it does only to full-book members of LOCAL 34. As a result, all those having any status of registration in the Port of San Francisco as Ship Clerks are union members, holding full-book membership in defendant LOCAL 34.

Similar provisions granting a union this type of control, have been held illegal and void. In Phoenix Tinware Co., Inc. (1952) 100 NLRB 528, the master contract provided that no tinsmith, welder, etc., should be employed, unless "recognized by the union." The Board held that since "recognition" by the union was not defined in the contract, and gave the union a "veto" on employment of any employee, this provision of the contract was invalid, and therefore the Board could hold an election for

want of a valid bargaining agreement. The Phoenix Case, 100 NLRB 528, turns on and follows Newton Investigation Bureau (1951) 93 NLRB 157, also a question of whether there should be an employee election held. The collective bargaining agreement provided that the employer could fill vacancies or create new positions, and choose his own employees "however, such persons employed are satisfactory to both parties to this agreement." No limit was placed on the ground of the union's discretion. The Board held that this contract provision as to requiring the union approval for hiring was beyond the intent of the union security provisions of Section 8 (a) (3) of the Act.

The arbitrator, by specific provision of Sec. 21 of Ex. 2 (deposition), Master Agreement for Clerks etc., has his authority limited to application and interpretation of the agreement as written, would not and could not under this agreement determine the nature and extent of the illegality. Actually, the arbitrator could not consider the oral parts of the contract which the defendants contend is much of the collective bargaining agreement, for want of having agreed upon and executed the wording of a "codification" of their numerous oral agreements, understandings and other matter they contend are a part of the agreement. See Posner vs. Grunwald-Marx, Inc. 56 Cal 2d 168, 363 Pac 2d eee, 14 Cal Rptr 296, for an able discussion by Justice Peters of such a provision in a collective bargaining agreement restricting the consideration of practices and "industrial common law" by the arbitrator.

## V. THE PLAINTIFFS SHOULD HAVE BEEN PERMITTED FULL AND COMPLETE ANSWERS TO THEIR INTERROGATORIES.

The plaintiffs sought by their interrogatories to elicit the

defendants' contentions as to the contract, and a mass of information on which oral depositions and discovery of documents and writings could be made. JUDGE SWEIGERT by his Order of May 10, 1963 (R-84) held these proper interrogatories and ordered them answered. A substantial part of the plaintiffs' case must, of course, be determined upon discovery, the doors of which are not open to those in arbitration. Indeed, under the equitable bill of discovery, before the Federal Rules, much of this information would be available to the plaintiffs. The defendants have throughout used every means to avoid discovery. After the Order was made, the Order was flagrantly violated by the defendants, there is no other recourse or remedy for the plaintiff than to ask sanctions. The Order appealed from denies the plaintiffs any further steps in their discovery.

Certainly, the portions of the action permitting the plaintiffs to obtain the information requested on the interrogatories and necessary by discovery, should not be denied them, least of all should the plaintiffs be denied any remedy which would make arbitration a mere empty gesture.

## CONCLUSIONS

1. The written collective bargaining agreement denies all effective remedy for any grievance, and prohibits arbitration for the plaintiffs.

2. The issue as to the collective bargaining agreement, and whether it contains any provision as to arbitration as contended by the defendants in their affidavit of ROBERTSON, or as denied by the plaintiffs' affidavits of MARVIN and CRITTENDEN, is an issue which must be tried. It is not to be determined by summary judgment on conflicting affidavits.

3. The factual question of waiver and the estoppel to raise any

contention of any other contract than the Master Agreement and its supplements as alleged in the complaint, is one that must be tried, not determined on summary judgment.

4. The Court merely stayed proceedings, without setting forth the specific steps of the alleged agreement to arbitrate. Any steps the plaintiffs may see fit to take in this arbitration, must be by hearsay, and the defendants can and will contend at every turn that they have a secret understanding for some other procedure. Any specific performance decree, judgment or order must set out specifically the acts to be done. That is wholly lacking in this Order appealed from.

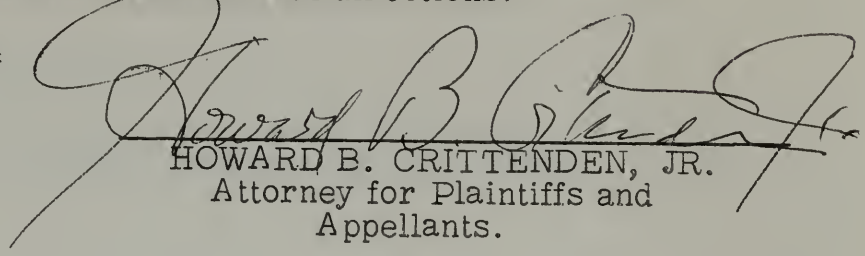
5. A summary judgment cannot be entered upon conflicting affidavits, but the issues of fact must be tried as any issues of fact are tried by the Court, particularly a legal action under Section 301 for breach of a collective bargaining contract.

6. There is no claim of any collective bargaining agreement authorizing any arbitrator the power and authority for the awarding of damages, the imposition of a trust, the declaratory relief sought, nor discovery sought. Such provisions as there are as to arbitration, is clearly not applicable to the plaintiffs, but only as to the Union on one side, and PMA on the other, or in limited instances to non-union registered Ship Clerks. The specific contract prohibits any arbitrator from determining either the alleged oral agreements, confining his determination solely to the contract as written. This precludes any arbitrator's determination of the illegal provisions, including the parts of the agreement in contravention of the Federal Act applicable to such jointly trusteed funds.

7. The plaintiffs are entitled to their discovery, and to enforce the Order of JUDGE SWEIGERT of May 10, 1963, ordering the defendant PMA to answer the interrogatories submitted.

We ask a reversal and remand with directions.

January 17, 1964



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# APPENDEX

SI. SURE testified during the deposition, page 4 thereof, that there was an oral agreement to codify the Clerk's Contract, as follows:

"Q. And what is your connection with the defendant PMA?

A. I am the president.

Q. Are you familiar with the Collective Bargaining Agreement applicable to the Ship Clerks in the Port of San Francisco?

A. I am.

Q. Now in this recent application for Class B Registrations of Clerks, I notice the term "Pacific Coast Longshore and Clerks Agreement." Would you tell me what that document is?

A. Well, the document now in printed form is a Longshore agreement which covers working conditions and other provisions governing the Longshore employment in Pacific Coast Ports. It also includes a supplement which is in the process of preparation covering the pay and working conditions of marine clerks; it also includes a number of Joint Coast Labor Relations Committee rulings, findings and agreements, and it includes a variety of arbitrator's awards. It is not a single document in the sense of a specific piece of paper.

Q. Now as to the points covering specifically Ship Clerks in the Port of San Francisco, that is in the course of preparation, is that correct?

A. Yes, sir.

Q. How far has it reached? Has it been typed yet?

A. I think the first draft has just been prepared. I say, "in the course of preparation." This is an endeavor to codify as well as we can in the agreement everything including the codification of early agreements, understandings, rulings and awards that I have mentioned. I think the status of it is that we have prepared a first draft of this codification or draft of the agreement, and this has been sent to the International Union for their observation or review, and there will be further discussion as to whether or not the language actually describes the agreement that we have reached in the past and currently are in effect. When that is completed, it will be printed up, as was the recent publication of the so-called Longshore portion of the agreement within the last few months, after some ten years of attempted codification of the changes that had taken place."

ST. SURE recognized the Master Agreement was in existence. Page 162 of the report of the deposition transcript contains the following:

"Q. So in June of 1962 there were in contemplation of the parties two sets of documents, one known as the Longshore Agreement, and the other known as the Clerk's Master Agreement.

A. There were in effect two pieces, or a combination of separate pieces of paper which have been referred to as the Coast Master Agreement for Clerks and Coast Agreement for Longshoremen. These documents have been merged in a single agreement covering both classifications of work.

Q. But I am referring to the date of this Exhibit 21, which was June of 1962. At that time, there were the two agreements, weren't there?

A. That's right. There were two documents which I indicated, with a historical background that I have referred to, and with the changes subsequently made to combine them into a single document which is still in process."

Exhibit 25, of this deposition, are Minutes of the defendant Clerk Committee of San Francisco. On the third page of that document, entitled "Memorandum", it specifically states:

"The parties acknowledge that the rules herein contained are intended by them to be in conformity and consistent with the provisions of the Master Agreement for Clerks and Checkers and Related Classification, and they do not intend hereby to change any of the provisions of said Master Agreement."

Exhibit 25 on page 1 states:

"Union submitted a list of 108 men for Employers' consideration. The list contains 56 men for the said San Francisco Dispatch Hall, 52 men for the East Bay Hall.

Employers, in considering the list, requested the Union an additional 17 men to make a total of 125, since the industry could well absorb the higher figure based on hours of work performed by both registered and social security over a period of one year.

Union felt that its membership at this time, was not prepared to accept a higher figure, and requested the Employer to give consideration to the present submitted list, with discussion of additional men to take place at an earlier date."

In the course of the ST. SURE deposition, the question turned to the arbitration. On page 115:

"Q. Now, suppose I ask you this? If a man had a -- we'll say a belief that he hadn't been registered, because he was discriminated against by the Union or because of non-union membership, he would take the grievance then to the same Committee, the Joint Port Labor Relations Committee, that did this act. Is that correct?

MR. ANDERSEN: You're assuming that something is being done --

MR. CRITTENDEN: I'm just trying to find out what the procedure is that Mr. St. Sure is describing to me.

WITNESS: Well, the procedure is described in the Contract, and I think that is the thing that controls.

MR. CRITTENDEN: Q. Well, Suppose a man were discriminated against by the Committee because of non-union status that he had, he would have to take it to the same group that had done this act, is that right?

MR. ERNST: Mr. Crittenden, the Contract is very clear on these things. What you say is right, but you are now asking all sorts of hypothetical questions."

On page 162 of the deposition:

Q. Now we will refer to Exhibit 2, Plaintiffs' Exhibit 2, which is the Master Agreement for Clerks and Checkers dated April 4, 1952, and refer to the grievance machinery on page 21. Now assume that there were a grievance, that for instance, Mr. Alexander, who is one of my clients in this matter, had and he wished to present. He would, I take it, in the first instance -- for instance, he claims he is registered. He would have to go to the Port Committee, wouldn't he? The Clerks Joint Port Labor Relations Committee, a defendant in this suit, isn't that the one he'd go to?

A. Yes, sir.

Q. And only in the event the employer member and the employee member disagreed, would he have the right to go to the next level?

MR. ERNST: Now you are speaking of 1952, Mr. Crittenden.

MR. CRITTENDEN: I'm talking of that document.

WITNESS: As of this document. That is correct.

MR. CRITTENDEN: Yes.

Q. And the power of the Coast Committee, I take it, on page 22, and the Coast Arbitrator, excludes anything to do with registration or dispatch, doesn't it? With the exception of the bottom paragraph which we will come to.

A. That's what it says there. I accept that, yes, sir.

Q. Now, at the bottom of the page, the only exception in there applies to registered and non union clerks, doesn't it?

A. That's what it says here, yes, sir.

Q. So a non-registered, non-union clerk is not within that clause for any exception

MR. ERNST: You're referring to the clause that takes him to the Coast Labor Relations Committee?

MR. CRITTENDEN: Yes, I'm trying to find out. He would not go anywhere above the Joint Port Labor Relations Committee unless one, either the employer or the employee representative disagrees.

MR. ERNST: Well, you seem to skip the local arbitrator, is that it?

MR. CRITTENDEN: Well, now, that's the point we're coming to.

Q. You can only go to the port or local arbitrator in the event there is a disagreement between both the employer and the employee members, isn't that correct?

A. I think that's what the language says.

Q. Yes. Do you know of any other language in any other provision of the Clerk's Agreement in effect up to the time of the filing of this action in the middle of 1962 that permitted any other procedure?

A. I don't know. I'd have to check back the documents as to what amendments were made. There were several amendments made to expand and provide for a procedure for the hearing of any claims of discrimination.

A. Now, on the last day of January 1963, some seven months or six months after this current suit was filed, the defendant union and the defendant PMA got together and made their agreement that we call Exhibit 20 for identification, is that correct?

MR. ERNST: I think you are not accurately stating the facts

MR. CRITTENDEN: Well, let's see if I can get the correct facts.

Q. How soon was it after our suit was filed before that was enacted?

MR. ERNST: That we can determine from the record.

MR. CRITTENDEN: Q. About six months?

A. Well, this document is dated January 31, 1963. I have already testified to that. A comparison of that date and the date of your suit would give you your answer, I guess.

Q. Did the union suggest this supplement of January 31, 1963, marked Plaintiffs' Exhibit 20?

A. I am not sure whether they did or we did. It was a matter of joint negotiation or agreement.

Q. Do you know who negotiated that?

A. Well, I was in on it.

Q. Well, when did you start negotiations?

A. I couldn't tell you.

Q. Could it have had anything to do with this pending litigation?

A. I don't know.

Q. Could that have been initiated in that way?

A. I don't know that it did. It may have had some bearing."